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APPENDIX

In The

Supreme Court of the United States

October Term, 1972

No. 72-397

Bonelli Cattle Company, a California corporation; County of Mohave, a political subdivision of the State of Arizona,

Petitioners,

—v.—

The State of Arizona, The State Land Department, a department of the State of Arizona; Andrew L. Bettwy, State Land Commissioner of the State of Arizona,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 8, 1972
CERTIORARI GRANTED JANUARY 22, 1973

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APPENDIX

RELEVANT DOCKET ENTRIES

1. Complaint to Quiet Title filed April 16, 1962.
2. Agreed Statement of Facts and Issues, Order and Certificate (omitting map exhibits), filed January 23, 1964.
3. Judgment and Decree Quieting Title, filed July 17, 1967.
4. Notice of Appeal to the Arizona Supreme Court filed September 15, 1967, by State of Arizona, et al.
5. Order of the Arizona Supreme Court denying petition for direct appeal to it and transferring appeal to Court of Appeals, Division 1, filed October 24, 1967.
6. Opinion Court of Appeals State of Arizona, Division 1, filed February 16, 1970.
7. Motion for Rehearing filed March 3, 1970, by the State of Arizona et al.
8. Order of Court of Appeals denying request for oral argument and motion for rehearing filed April 20, 1970.
9. Petition for Review by the Supreme Court of Arizona filed April 23, 1970, by the State of Arizona et al.
10. Order of the Arizona Supreme Court denying Petition for Review, filed May 12, 1970.
11. Mandate of the Court of Appeals to the Superior Court of Mohave County, Arizona, filed May 15, 1970.
12. Motion for Reconsideration of Motion for Rehearing (Petition for Review) filed May 26, 1970, by State of Arizona et al.
13. Response to Motion for Reconsideration filed May 28, 1970.
14. Order of Arizona Supreme Court filed June 2, 1970, granting Motion for Reconsideration, denying request for oral argument and directing Court of Appeals to recall Mandate.
15. Order of Court of Appeals filed June 8, 1970, recalling Mandate.

16. Order of Arizona Supreme Court filed June 16, 1970, that Petition for Review is submitted.
17. Reference to Opinion of Arizona Supreme Court filed October 4, 1971, appearing as Appendix A, pages 1a through 36a, in Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona.
18. Motion for Rehearing of Arizona Supreme Court's Opinion filed January 17, 1972, by Bonelli.
19. Order of Arizona Supreme Court filed January 25, 1972, granting all petitions filed asking for leave to file Amici Curiae Briefs relative to Motion for Rehearing.
20. Objection to Motion for Rehearing filed January 31, 1972, by State of Arizona et al.
21. Order denying Motion for Rehearing filed April 13, 1972.
22. Reference to Supplemental Opinion of Arizona Supreme Court filed April 13, 1972, appearing as Appendix B, pages 1b through 10b, in Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona.
23. Mandate filed April 13, 1972 by the Arizona Supreme Court.
24. Order of the Supreme Court of the United States granting writ of certiorari, dated January 22, 1973.

In the Superior Court of the State of Arizona
in and for the County of Mohave

Civil Action No. 5631

BONELLI CATTLE COMPANY,
a California corporation, *plaintiff*,

v.

THE STATE OF ARIZONA; THE STATE LAND DEPARTMENT, a Department of the State of Arizona; OBED M. LASSEN, State Land Commissioner of the State of Arizona, *defendants*.

COMPLAINT TO QUIET TITLE

(Filed April 16, 1962)

Plaintiff for its cause of action against the defendants alleges:

I

(1) That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California and is authorized to transact its corporate business within the State of Arizona.

(2) That defendant The State of Arizona is a body politic.

(3) That defendant The State Land Department is a Department of the State of Arizona and is empowered under law to administer all laws relating to lands owned by, belonging to and under the control of the State of Arizona. [1]

(4) That defendant Obed M. Lassen is the duly appointed, qualified and acting State Land Commissioner of the State of Arizona and as such is the executive officer of the State Land Department and empowered under law to exercise and perform all powers and duties vested in or imposed upon the State Land Department.

II

That the real property the subject of this action is situate in Mohave County, State of Arizona, and is described as follows:

Lot One (1); the South Half of the Northeast Quarter (S½NE¼) and the Southeast Quarter (SE¼) of Section Three (3), Township Nineteen (19) North, Range Twenty-two (22) West of the Gila and Salt River Base and Meridan.

III

That plaintiff is the owner in fee simple of the above-described lands as the ultimate successor in interest to the patentee of said real property by virtue of patent No. 160022 granted by the United States of America November 5, 1910, to Santa Fe Pacific Railroad Company, successor in interest to the Atlantic and Pacific Railroad Company. That said real property is particularly delineated on the Official Plat of Survey of Fractional Township 19 North, Range 22 West of the Gila and Salt River Meridian, Arizona, approved and filed in the Surveyor General's Office, Phoenix, Arizona, June 29, 1906, a copy of which is attached hereto, marked Exhibit A and by reference made a part hereof.[2]

IV

That during the past two years the United States Department of the Interior, through its Bureau of Reclamation, has, without the permission of plaintiff or its predecessors in interest, caused to be constructed through the above-described lands a rechannel of the Colorado River, a navigable stream.

V

That plaintiff is informed and believes and therefore alleges that the United States Department of the Interior

and its Bureau of Reclamation obtained permission from the State of Arizona by and though its State Land Department and the State Land Commissioner of Arizona to go upon said land and construct the new channel for the Colorado River, over across and upon said land. That plaintiff is therefore credibly informed and believes that notwithstanding the fact that it is the record owner of the whole fee title to said land that the defendants, and each of them, make some claim adverse to the aforesaid right, estate, title and interest of the plaintiff to said real property, which claim threatens to interfere with plaintiff's enjoyment of its fee simple estate in said real property unless an order and decree of this Court is obtained quieting title in plaintiff and barring defendants, and each of them, from forever having, asserting or claiming any right, title, estate or interest in or to said real property adverse to plaintiff.

Wherefore, plaintiff prays for an order and decree of this Court establishing and quieting title in and to the real property in plaintiff, free and clear of any claim of any right, estate, title or interest of the defendants, and each of them, [3] therein adverse to the plaintiff, and forever barring and estopping said defendants, and each of them, from having, asserting or claiming any right, title, estate or interest in or to said real property adverse to the claim, right and title of plaintiff; that plaintiff have and recover judgment for its costs herein expended and incurred; and for such other and further relief as to the Court may seem just and proper in the premises.

ELMER C. COKER
Elmer C. Coker
Suite 840 Security Building
Phoenix, Arizona
Attorney for Plaintiff [4]

(Verification omitted)

In the Superior Court of the State of Arizona
in and for the County of Mohave

(title omitted in printing)

AGREED STATEMENT OF FACTS AND ISSUES, ORDER AND CERTIFICATE

(Filed January 23, 1964)

Pursuant to Rule 52 (c) Rules of Civil Procedure, It is hereby stipulated by the respective attorneys for the plaintiff and defendants that the following are the Agreed Statement of Facts and the Issues to be determined by the Court:

I

Plaintiff claims to be the record owner in fee simple of:

> Lot 1; the S½NE¼ and the SE¼ of Section 3, Township 19 North, Range 22 West of the Gila and Salt River Base and Meridan.,

situate in Mohave County, State of Arizona, as evidenced by that certain warranty deed dated the 12th day of August, 1955, wherein Harry E. Miller and Orpha S. Miller, his wife, are grantors, and [1] plaintiff is the grantee, which warranty deed was placed of record in the office of the Mohave County Recorder on August 19, 1955, in Book 82 of Deeds, Pages 246-247, a true copy of which deed is attached hereto, made a part hereof and marked Exhibit A.

II

That during the years 1905 to 1906 the Surveyor General's Office of the United States Department of the Interior, under and by virtue of directions from the General Land Office and the Secretary of the Interior, caused to be made a survey of Fractional Township 19 North, Range 22 West of the Gila and Salt River Meridian, Arizona, among which lands so surveyed in said Township were Sections 2, 3, 4, 9 and 10, or portions

thereof, and established the meander line of the left bank of the Colorado River in the course of making said survey through said Sections 3, 4, 9 and 10. That the official map of said survey was approved and filed in the Surveyor General's Office, Phoenix, Arizona, June 29, 1906. That a true copy of said map showing the above-described lands in Section 3 is attached to plaintiff's complaint as Exhibit A and is likewise attached hereto as Exhibit B. That at the time of the filing said official map of said survey the lands above-described in Section 3 as shown on Exhibit B were located some distance from the meander line of the left bank of the Colorado River.

III

That pursuant to various Acts of Congress relating to granting land to aid in the construction of railroads the United States of America by Patent No. 160022 dated November 5, 1910, recorded July 3, 1911, in Book 21 of Deeds, pages 484-488, [2] records of Mohave County, gave and granted unto the Santa Fe Pacific Railroad Company, successor in interest to the Atlantic and Pacific Railroad Company, and to its successors and assigns forever, among other lands:

> Lots 1, 2, 3, 4, 5 and 6; the S½NE¼; the S½NW¼; the NE¼SW¼, and the SE¼ of Section 3, Township 19 North of Range 22 West, containing 589.40 acres;

the lands so described being all of Section 3, a true copy of which patent is attached hereto as Exhibit C. That the lands involved herein, described on Page .... of said patent, for easy identification, are underscored in red pencil.

IV

That pursuant to several reclamation withdrawal orders made by the President of the United States and the Secre-

tary of the Interior in the year 1903 and years subsequent thereto all of Section 2, as well as other lands, in said Township and Range were withdrawn from entry and disposition under the Public Land Laws, including the various grants to the then Territory of Arizona made by Acts of Congress. That said Section 2 still remains withdrawn from entry and the State of Arizona has never received title to the same under the provisions of its Enabling Act or any other Act of Congress, nor has the State of Arizona ever offered said Section 2, or any portion thereof, as lieu land for selection of other public lands pursuant to the Enbling Act, or any other Act of Congress. That if said lands were restored for entry by the United States, in the absence of any disposal of the land by lieu selection rights by the State of Arizona, title to said Section 2 would vest in the State of Arizona pursuant to the provisions of the Enabling Act and other Acts of Congress. That the [3] State of Arizona does not intend to offer said Section 2 as lieu land in exchange or selection for other lands of the United States under the provisions of the Enabling Act or any other Act of Congress applicable thereto. That if any accretion rights by virtue of the movement of the Colorado River have attached to Section 2, it is the intention of the State of Arizona to claim any of said accretion rights attaching or appurtenant thereto when and if the State should obtain title to said Section.

V

That during the late winter of 1959 and the early part of 1960 the United States of America, through its Bureau of Reclamation, without permission or consent from or by either plaintiff or any of the defendants, changed the channel of the Colorado River by relocating the same and rechannelling said River through the lands of plaintiff in Section 3 above described. That the location of the River

as it was so rechannelled by the Bureau of Reclamation is shown on the 1960 Mosaic Aerial Survey photo compiled July and August 1961 attached hereto as Exhibit D, and a topography map prepared by Region 3, Bureau of Reclamation, United States Department of the Interior, Boulder City, Nevada, Edition of 1952, Revised August 1, 1960, which indicates the bank of the active channel prior to rechannelization by the Bureau of Reclamation, United States Department of the Interior, indicated thereon by a red pencil line, a true copy of which topographic map, together with explanatory letter from the Regional Director of said Bureau of Reclamation dated January 31, 1964, is attached hereto as Exhibit E-1 and Exhibit E-2. That said topographical plat, however, has never been filed with the Bureau of Land Management, United States Department of the Interior, as an official plat of survey. [4]

VI

That pursuant to Chapter 36, Laws of 1959, ARS, Section 41-523, Twenty-fourth Legislature of the State of Arizona, and Chapter 118, Forty-ninth Session, Nevada Legislature, the Colorado River Boundary Commission of the State of Arizona and the Colorado River Boundary Commission of the State of Nevada under date of February 6, 1960, entered into a Compact defining a portion of the Arizona-Nevada boundary on the Colorado River from the center of the Colorado River as relocated and rechannelled by the Bureau of Reclamation. That a true copy of said Compact is attached hereto as Exhibit F. That attached to said Compact is a map made by the Boundary Commission's Registered Engineer which shows the location of the lands involved herein and the relocation of the Colorado River in relation thereto, the lands for easy identification being colored in red on the map. That said Compact

was approved and ratified by the Legislature of the State of Nevada and approved by its Governor March 9, 1960 (Chapter 119 Nevada Revised Statutes 1960) and was approved and ratified by the Legislature of the State of Arizona by Chapter 69, Laws of 1960, and approved by the Governor March 24, 1960 (which appears after the printed text of Section 41-523, ARS, 1963 Cumulative Pocket Part). That after ratification of the Compact by the States of Nevada and Arizona, Congress by Public Law 87-50, Eighty-seventh Congress, First Session (75 Stat. 93) approved June 16, 1961, ratified and confirmed said Compact.

VII

That during the month of December, 1961, the Bureau of Land Management of the United States Department of the Interior [5] caused to be made a Limited Dependent Resurvey of Sections 2 and 10 of said Township and Range for the purpose of retracing and reestablishing the boundaries of Sections 2 and 10 and to restore the corners thereof in their original positions according to the best available evidence. That the plat of this Limited Dependent Resurvey was approved October 12, 1962, and thereafter filed in the Phoenix Land Office, Bureau of Land Management, United States Department of the Interior, Phoenix, Arizona, a true copy of said plat being attached hereto as Exhibit G. That said survey and plat were made without the knowledge or consent of or participation by either plaintiff or defendants.

VIII

That since the years 1905 and 1906, and particularly since June 29, 1906, the date of the approval of the official map of survey, Exhibit B, until the river's rechannellization by the Bureau of Reclamation as stated in Paragraph V, the channel of the Colorado River has moved eastward

but the dates and degree of said movements cannot be ascertained with any degree of accuracy without the taking of voluminous testimony and documentary evidence, except, however, two aerial photographs are available which are attached hereto as Exhibits H and I, Exhibit H being an aerial dated April 24, 1938, showing the location and course of the Colorado River at that time, upon which the boundaries of Section 3 and adjoining sections have been scaled and Exhibit I being an aerial photo taken in 1942 showing the location and course of the Colorado River at that time upon which the boundaries of Section 3 together with adjoining sections have been scaled.

IX

That the only approved official plats of survey of record in the Phoenix Land Office, Bureau of Land Management, [6] United States Department of the Interior, Phoenix, Arizona, are those plats attached hereto as Exhibit B and Exhibit G.

ISSUES TO BE DETERMINED BY THE COURT

(1) Does the State of Arizona have any right, title, interest or claim to the lands in Section 3, Township 19 North, Range 22 West of the Gila and Salt River Meridian, Arizona, claimed to be owned by plaintiff in fee simple by virtue of the patent from the United States of America to Santa Fe Pacific Railroad Company, successor in interest to the Atlantic and Pacific Railroad Company, dated November 5, 1910, recorded July 3, 1911, in Book 21 of Deeds, pages 484-488, records of Mohave County, by virtue of any accretion rights which may now or in the future attach and become appurtenant to Section 2 by reason of the natural or manmade movement of the Colorado River?

(2) Does the State of Arizona own the lands in Section 3 claimed to be owned by plaintiff by reason of the fact

that the Colorado River is a navigable river by decision of the United States Supreme Court decided May 18, 1931, in *Arizona v. California*, 283 U. S. 423, 74 L. ed. 1154, and that as a result thereof under previous decisions of the Supreme Court of the United States the Territory and later the State of Arizona became the owner in fee simple from the high-water mark on the East bank of the Colorado River to the center thereof?

(3) If the answer to the foregoing question is in the affirmative, did the State of Arizona obtain title when the River moved eastward from its original location as shown on the official plat of survey approved June 29, 1906, Exhibit B, to its present location as shown on Exhibits B and G notwithstanding [7] the fact that prior to statehood, on November 5, 1910, the United States conveyed title to the lands in question to the Santa Fe Pacific Railroad Company (See Exhibit C)?

It Is Further Stipulated that the foregoing Statement of Facts and Issues to Be Determined by the Court, upon approval and certification by the Court, shall in the event of an appeal by either party to the Supreme Court of the State of Arizona from any final decision of the above-entitled Court constitute, together with the judgment, the record on appeal.

Dated: November 25, 1964.

/s/ Elmer C. Coker
Elmer C. Coker
Suite 840 Security Building
Phoenix, Arizona 85004
Attorney for Plaintiff

Robert W. Pickrell
The Attorney General
State House, Phoenix, Arizona
/s/ Dale R. Shumway
Assistant Attorney General

ORDER AND CERTIFICATE

It is hereby Ordered that the foregoing Statement of Facts are approved and certified to be correct;

It Is Further Ordered that the foregoing Issues are approved and certified to be the issues to be determined by this Court; and [8]

It Is Further Ordered that the foregoing Statement of Facts and Issues shall, in the event an appeal is taken from any final judgment of this Court to the Supreme Court of Arizona, be made a part of the record thereof.

Done in Open Court this 23rd day of January 1964.

T. J. MAHONEY
Judge of the Superior Court [9]

(Exhibit A, B and applicable parts of Exhibit C follows; Exhibits D, E-1 and E-2, F omitted.)

Exhibit A

WARRANTY DEED

The Grantors, HARRY E. MILLER and ORPHA S. MILLER, his wife, for and in consideration of Ten and No/100 Dollars ($10.00) and other good and valuable considerations, receipt of which is hereby acknowledged, do hereby Convey unto Bonelli Cattle Company, a corporation organized and existing under the laws of the State of California, the following described real property, to-wit:

> S½ Section 1; E½ Section 3, excepting Lot 2 thereof; S½ Section 11; S½ Section 13; E½ Section 15, excepting therefrom the E½ of Lot B and all of Lots 1, 2, 8, 9, 10, 12, 13, 14, 15 and 16 as shown on plat of a Subdivision of said Section 15 filed in the Office of the County Recorder of Mohave County, Arizona, on May 18, 1931; E½, NE¼ NW¼, NW¼, SW¼ and SW¼ of Section 23, all in Township 19 North, Range 22 West, G&SRB&M, Mohave County, Arizona, together with the appurtenances thereto in anywise belonging or appertaining.

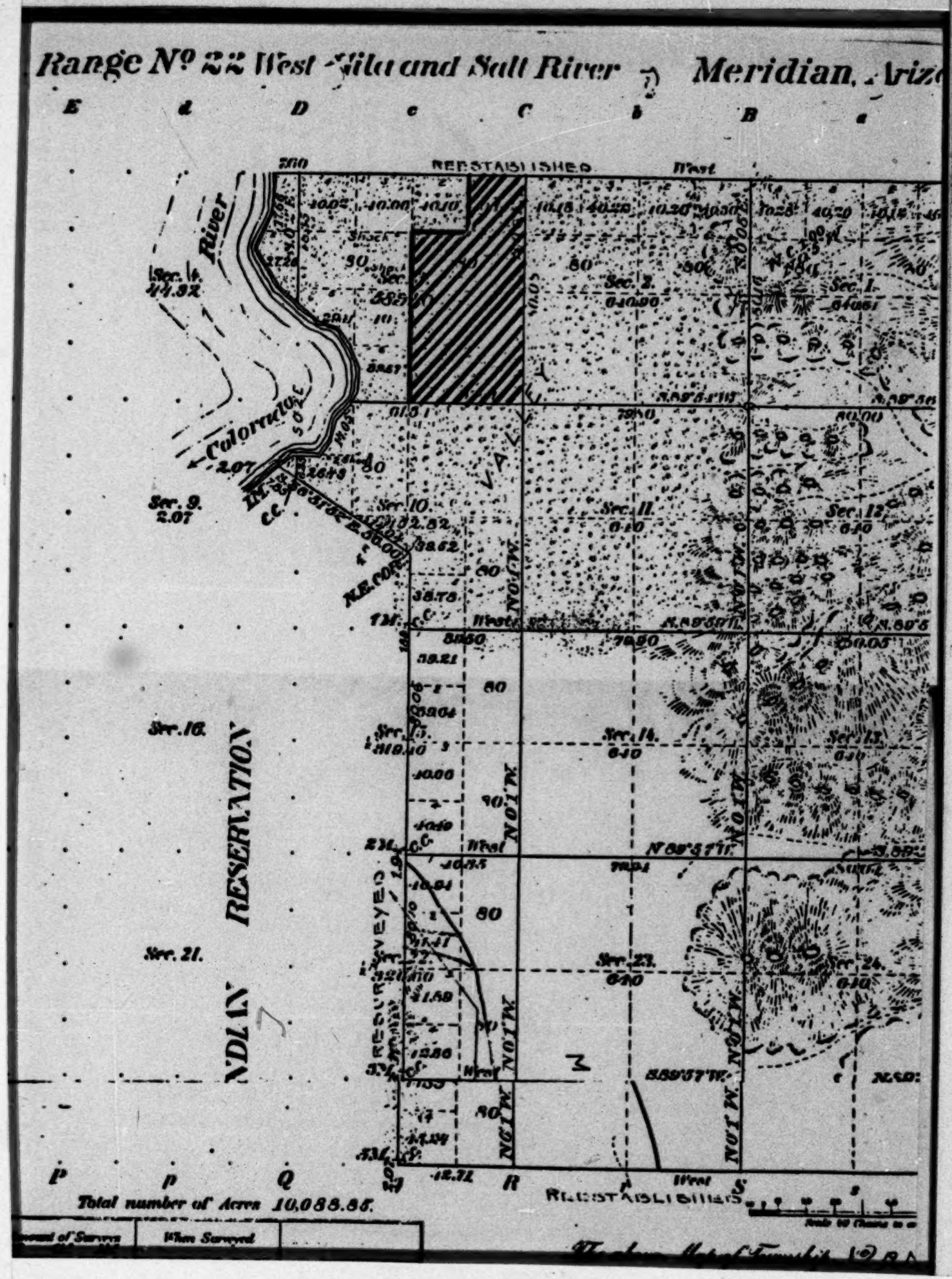
And we WARRANT the title against all persons whomsoever, subject to unpatented mining claims or locations covering all of or any portion of the property described herein or any loss which might occur due to mining operations thereon; also to roads and rights of way for roads, canals, laterals and ditches, reservations and exceptions of record, if any.

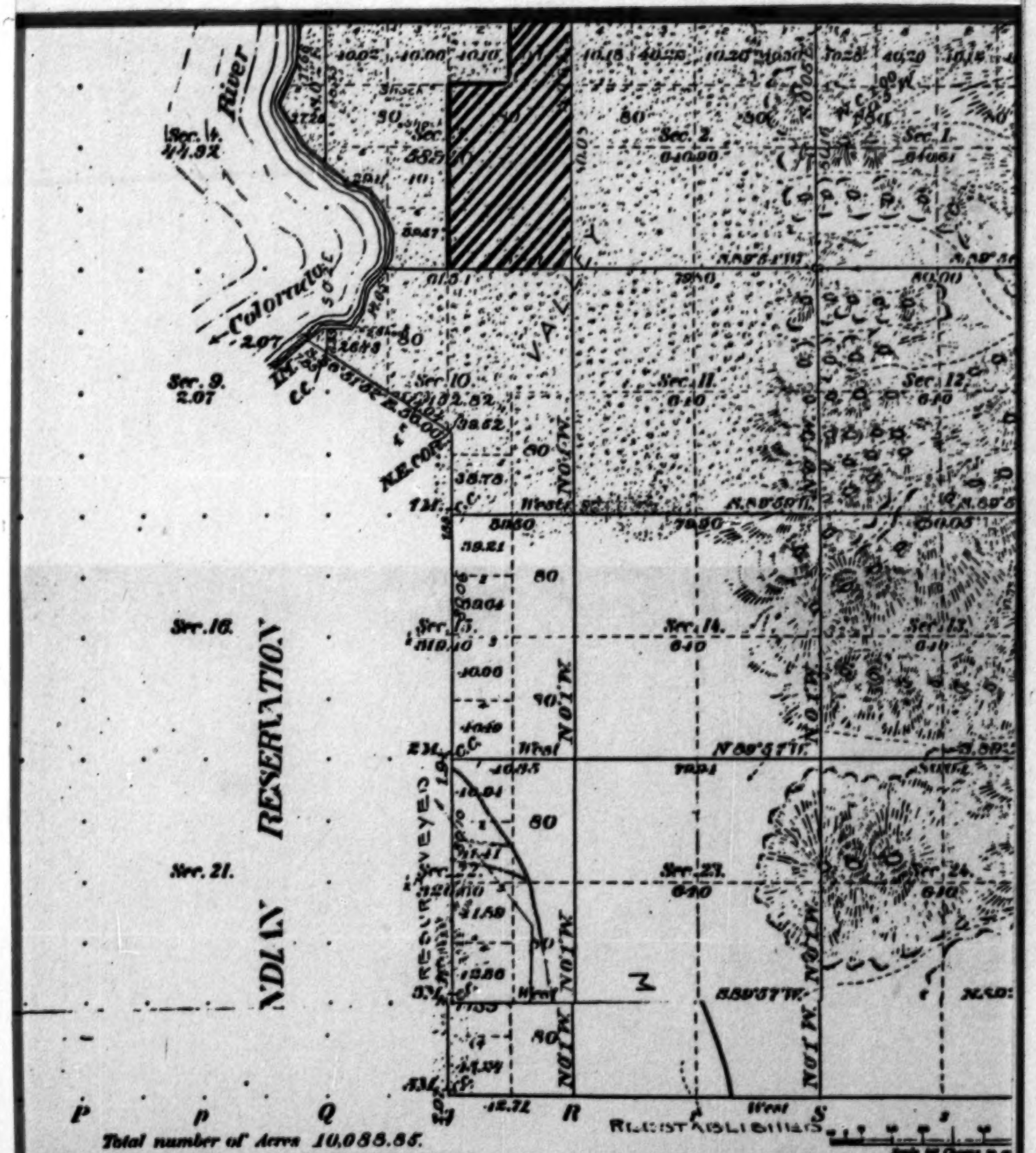
Witness the hands of said Grantors this-12-day of August, 1955.

/s/ HARRY E. MILLER
Harry E. Miller
/s/ ORPHA S. MILLER
Orpha S. Miller

(Acknowledgement Omitted)

(Recorded August 19, 1955, Book 82 of Deeds, pages 246-247, Records of Mohave County, Arizona.)


Range No 22 West Gila and Salt River Meridian, Ariz
E d D c C b B a
RE-ESTABLISHED
River
Colorado
Sec. 9.
Sec. 10.
Sec. 11.
Sec. 12
Sec. 16.
Sec. 14.
Sec. 13
Sec. 21.
Sec. 23.
Sec. 24.
RESERVATION
RESURVEYED
P p Q R S
Total number of Acres 10,088.85.
RE-ESTABLISHED
Scale 40 Chains to an



Amount of Surveys M.	Ch.	Lks.	When Surveyed
11	50	31	Dec 24, 1905 to [illegible] 1906
25	36	82	
1	57	74	
6	2	07	
	38	00	

EXHIBIT B

MAP, OFFICIAL SURVEY OF FRACTIONAL TOWNSHIP 19 NORTH, RANGE 22 WEST

FILED JUNE 29, 1906

Exhibit C

Patent No. 36

SANTA FE PACIFIC RAILROAD LANDS

Primary Limits

Phoenix Land District

Arizona.

4-1043

The United States of America,
to all to whom these presents shall come, greeting:

Whereas by the Act of Congress approved July 27, 1866, entitled "An Act granting land to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast," there was granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, "Every alternate section of public land, not mineral, designated by odd number, to the amount of twenty alternate sections per mile on each side of said railroad line, as said Company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the Office of the Commissioner of the General Land Office;" and [1]

Whereas, official statements bearing dates December 17, 1880, April 19, 1881, January 7, and December 16, 1882, and

November 3, 1883, have been filed in the General Land Office, showing that the commissioners appointed by the President, under the provisions of the fourth section of said Act of Congress approved July 27, 1866, have reported to him that the line of said railroad and telegraph from a point in Township Eight north of Range Two East, Territory of New Mexico, and ending at a point on the west bank of the Colorado River in the State of California, has been constructed and fully completed and equipped in the manner prescribed by the said Act of Congress; and

Whereas, certain tracts of land have been listed by the duly authorized land agent of the said Atlantic and Pacific Railroad Company as shown by his original list, approved by the local officers, and now on file in the General Land Office; and

Whereas, it is shown by evidence filed in the office of the Secretary of the Interior, that the Santa Fe Pacific Railroad Company, under a purchase at foreclosure sale of the property and rights of the Atlantic and Pacific Railroad Company, and by compliance with the provisions of the Act of Congress approved March 3, 1897,—29 Stat., 622—, became the lawful successor in interest of the said Atlantic and Pacific Railroad Company; and

Whereas, the said tracts of land lie coterminous with the constructed line of road, and are particularly described as follows, to wit:

Gila and Salt River Meridian—Arizona

* * * * *

Township Nineteen North of Range Twenty-Two West

* * * The lots one, two, three, four, five and six, the south half of the northeast quarter, the south half of the northwest quarter, the northeast quarter of the southwest quarter, and the southeast quarter of section three, containing five hundred eighty-nine and forty hundredths acres; * * *

Now know ye, that the United States of America, in consideration of the premises, and pursuant to the said Acts of Congress, has given and granted and by these presents does give and grant, unto the said Santa Fe Pacific Railroad Company succesor [2] in interest to the Atlantic and Pacific Railroad Company, and to it successors and assigns, the tracts of land listed as aforesaid and described in the foregoing; to have and to hold the said tracts, with the appurtenances thereof, unto the said Santa Fe Pacific Railroad Company, successor as aforesaid, and to its successors and assigns, forever.

In testimony whereof, I, William H. Taft President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the FIFTH day of NOVEMBER in the year of our Lord one thousand nine hundred and TEN and of the Independence of the United States the one hundred and thirty-fifth.

(GENERAL)
(LAND)
(OFFICE)
(SEAL)

By the President: Wm. H. Taft
By H. P. Le Roy, Secretary

John O'Connell
Acting Recorder of the General Land Office

RECORDED: Patent Number 160022

Filed and Recorded at request of Howel Jones July 3rd A.D. 1911 at 9 o'clock A.M. in Book 21 of Deeds, Pages 484 Et Seq, Records of Mohave County, Arizona Territory.

J. W. Morgan
County Recorder. [3]

In the Superior Court of the State of Arizona
In and for the County of Mohave

(title omitted in printing)

JUDGMENT AND DECREE QUIETING TITLE

(Filed July 17, 1967)

This cause having come on regularly for hearing on agreed statement of facts and issues pursuant to stipulation of the respective attorneys for plaintiff and defendants under Rule 52(c), Rules of Civil Procedure, dated January 20, 1964, and the matter having been submitted to the Court by briefs of the respective counsel and oral argument held thereon September 16, 1964, Elmer C. Coker, Esq., appearing for the plaintiff and Dale R. Shumway, Esq., Assistant Attorney General, appearing for the defendants, the Court, being fully advised in the premises, answers the following issues submitted to it for determination in the negative by reason of its findings hereinafter set forth:

(1) Does the State of Arizona have any right, title, interest or claim to the lands in Section 3, Township 19 North, Range 22 West of the Gila and Salt River Meridian, Arizona, claimed to be owned by plaintiff in fee simple by virtue of the patent from the United States of America to Santa Fe Pacific Railroad Company, successor in interest to the Atlantic and Pacific Railroad Company, dated November 5, 1910, [1] recorded July 3, 1911, in Book 21 of Deeds, pages 484-488, records of Mohave County by virtue of any accretion rights which may now or in the future attach and become appurtenant to Section 2 by reason of the natural or manmade movement of the Colorado River?

(2) Does the State of Arizona own the lands in Section 3 claimed to be owned by plaintiff by reason of the fact that the Colorado River is a navigable

river by decision of the United States Supreme Court decided May 18, 1931, in *Arizona v. California*, 283 U. S. 423, 74 L. ed. 1154, and that as a result thereof under previous decisions of the Supreme Court of the United States the Territory and later the State of Arizona became the owner in fee simple from the high-water mark on the East bank of the Colorado River to the center thereof?

and the Court finds:

(1) That it is undisputed the predecessor in interest of plaintiff Santa Fe Pacific Railroad Company, successor in interest to The Atlantic and Pacific Railroad Company, was the owner in fee simple of the real property hereinafter described prior to the State of Arizona being admitted as a State of the Union by virtue of Patent issued by the United States of America on November 5, 1910, recorded July 3, 1911, in Book 21 of Deeds, pages 484 et seq., records of Mohave County, Arizona Territory, pursuant to the Act of Congress approved July 27, 1866, entitled: An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast (14 Stat. 292), the lands in Township 19 North, Range 22 West, described therein being in accordance with the Official Plat of Survey approved and filed in the United States Department of the Interior Surveyor General's Office, Phoenix, Arizona, on June 29, 1906, attached as Exhibit B to the Agreed Statement of Facts and Issues on file herein. [2]

(2) That through mesne conveyances title vested in plaintiff by virtue of warranty deed dated August 12, 1955, recorded in Book 82 of Deeds, pages 246-247, records of Mohave County, Arizona, and therefore plaintiff is now the owner in fee simple of the real property hereinafter

described, free and clear of any right, estate, title or interest of the defendants, and each and all of them.

(3) That according to the aforesaid Official Plat of Survey approved and filed June 29, 1906, the Colorado River did not pass through any portion of the lands hereinafter described nor border thereon but since said time the Colorado River has moved eastward to various and different points and parcels of said land until its channel was stabilized in 1960 by rechannelization construction work conducted by the Department of the Interior through its Bureau of Reclamation where its stabilized man-made channel now crosses over the westerly portion of the lands hereinafter described and which man-made channel has been declared by Compact of the States of Nevada and Arizona approved by Congress June 16, 1961, Public Law 87-50, Eighty-seventh Congress, First Session (75 Stat. 93) to be the boundary between the States of Nevada and Arizona.

(4) That the Agreed Statement of Facts and Issues do not establish the dates, degree and manner of movement of the Colorado River, but such issues are immaterial in determination of the rights of the parties in this action.

It Is Therefore Ordered, Adjudged and Decreed that plaintiff Bonelli Cattle Company, a California corporation, is the owner in fee simple of and is entitled to the possession, use and enjoyment of the following described real property situate in Mohave County, State of Arizona: [3]

> Lot One (1); the South Half of the Northeast Quarter (S½NE¼) and the Southeast Quarter (SE¼) of Section Three (3), Township Nineteen (19) North, Range Twenty-two (22) West of the Gila and Salt River Base and Meridian.

It Is Further Ordered, Adjudged and Decreed that the defendants, the State of Arizona, the State Land Depart-

ment, a Department of the State of Arizona, and Obed M. Lassen, State Land Commissioner of the State of Arizona, and each and all of them, have no right, title, interest, claim or estate whatsoever in and to the above-described real property or any part thereof, and that said defendants and all persons or legal entities claiming under them, or any of them, are hereby barred from claiming or asserting any claim, estate, right, title or interest in or to said real property, or any part thereof, adverse to plaintiff Bonelli Cattle Company, and said defendants, and each of them, are hereby perpetually enjoined and restrained from interfering with plaintiff's right to the possession, use and enjoyment thereof.

It Is Further Ordered, Adjudged and Decreed that each party shall bear their own costs in this action incurred.

Done, Settled and Approved in open Court this 17th day of July, 1967.

/s/ T. J. MAHONEY
T. J. Mahoney, Judge

Receipt of a copy of the foregoing Judgment and Decree is hereby acknowledged and the same is approved as to form.

Dated: July 14th, 1967.

DARRELL F. SMITH
The Attorney General
DALE R. SHUMWAY
Assistant Attorney General
By /s/ DALE R. SHUMWAY
Dale R. Shumway [4]

(Recorded July 28, 1967, in Book 110 of Dockets, pages 228-232, Records of Mohave County, Arizona, and August 21, 1967, Instrument No. 656358, Official Record Book No. 817, records of Clark County, Nevada) [5]

In the Superior Court of the State of Arizona
in and for the County of Mohave

(Title omitted in printing)

NOTICE OF APPEAL

(Filed September 15, 1967)

Comes Now the defendants and appeal to the *Supreme Court, State of Arizona* from the Judgment and Decree of the Superior Court of Mohave County, Arizona, made and entered on the 17th day of July, 1967, in which said Court granted a Judgment and Decree in favor of the plaintiff.

Dated this 14th day of September, 1967

DARRELL F. SMITH
The Attorney General

By /s/ DALE R. SHUMWAY
Dale R. Shumway
Special Assistant Attorney General
Attorney for the Defendants

Supreme Court of the State of Arizona

No. 9115 (Supreme Court)
No. 5631 (Mohave County)

The State of Arizona, The State Land Department and Obed M. Lassen, State Land Commissioner, Appellants (Defendants),

v.

Bonelli Cattle Company, a California corporation, Appellee (Plaintiff).

October 26, 1967

The following action was taken by the Supreme Court of the State of Arizona on October 24, 1967, in regard to the above-entitled cause:

"Order: Petition for direct appeal to Supreme Court —Denied.

"Further Order: This appeal transferred to Court of Appeals, Division 1, Phoenix, Arizona."

SYLVIA HAWKINSON, Clerk
LUCILLE BROOKS, Assistant Clerk

In the Court of Appeals, State of Arizona

Division One

The State of Arizona, The State Land Department, a Department of the State of Arizona; OBED M. LASSEN, State Land Commissioner of the State of Arizona, Appellants,

v.

Bonelli Cattle Company, a California corporation, Appellee.

No. 1 CA-CIV 734, DEPARTMENT A—Arizona Supreme Court Number 9115 (this matter was filed in the Arizona Supreme Court and transferred to this Court by order of the Supreme Court.)

(Filed February 16, 1970)

Appeal from the Superior Court of Mohave County

Cause Number 5631

Honorable T. J. Mahoney, Judge

AFFIRMED

Gary K. Nelson, The Attorney General — **Phoenix**
By Dale R. Shumway
Special Assistant Attorney General
Attorneys for Appellants

Elmer C. Coker — **Phoenix**
Attorney for Appellee

Cameron, Judge

This is an appeal by the defendant, State Land Department, from a judgment in favor of the plaintiff, Bonelli Cattle Company, which quieted title to certain land [1] situated along the Colorado River in Mohave County, Arizona.

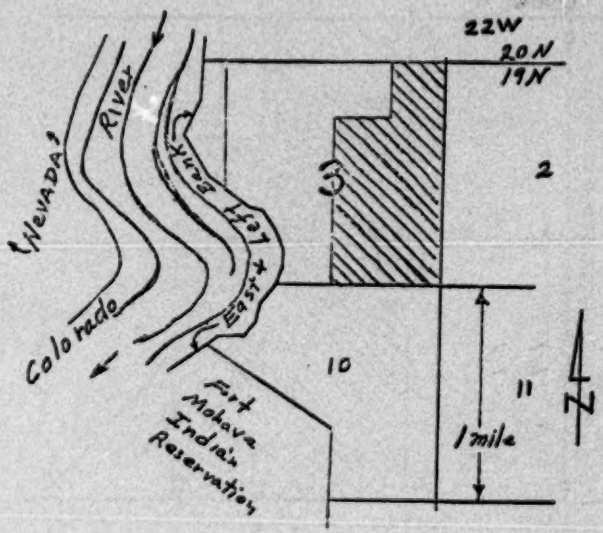
We are called upon to answer the following questions:

1. Did the State of Arizona obtain title to the bed of the Colorado River when admitted to the Union by virtue of the "equal footing" doctrine?
2. Did the trial court err in not determining whether the river had moved by avulsion or accretion in making its decision?
3. When a navigable river is rechanneled by third parties and the former river bed is exposed by the removal of the water therefrom, who has title to the land thus exposed?

The matter was tried upon an agreed statement of facts which may be summarized as follows:

1. When originally surveyed in 1905-1906, the active flow channel of the Colorado River was entirely to the west of the subject land and did not in any way encroach upon said land. See Exhibit "B" below. [2]

Sec. 3 – 19N, 22W
Subject Land in Relation to
1906 River Channel



Subject Land —
1906 General Land Office Survey

Fig. 2. Exhibit B

2. In 1910, the United States conveyed the subject land to the plaintiff's predecessor in interest, the Santa Fe Pacific Railroad Company and the plaintiff is the record owner in fee simple of the lands involved in the action.

3. Since the original survey and conveyance of the subject land, the Colorado River has moved eastward, and has in the past covered much, if not all of, the subject land; that immediately prior to 1959, the active flow channel of the river occupied most of the subject land. See Exhibit "E-1" below.

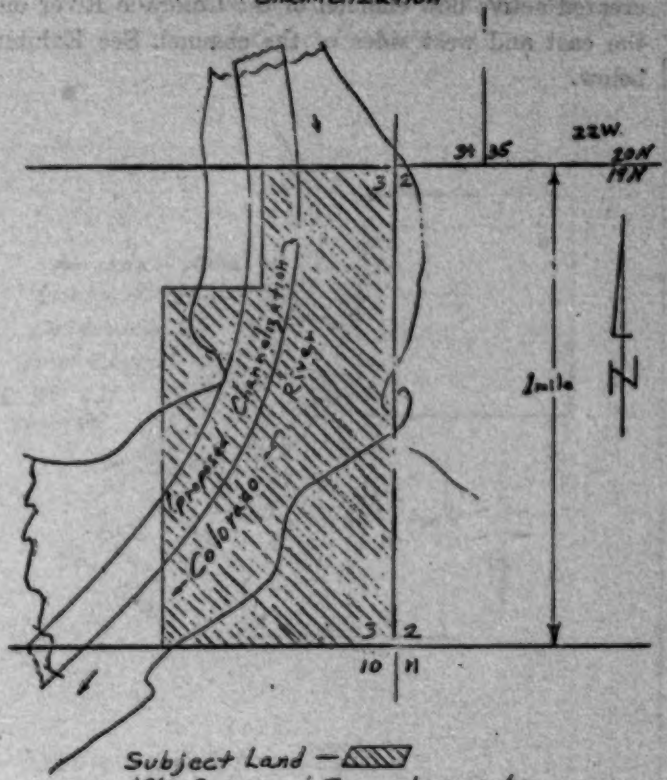
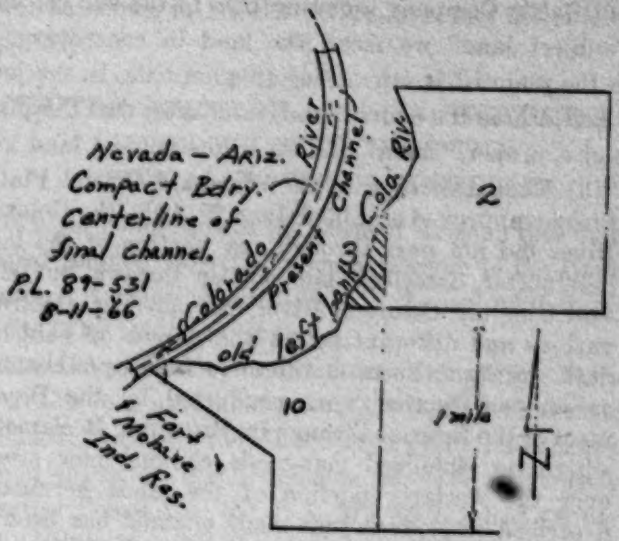


Fig. 3. Exhibit E-1

4. In 1959, the Bureau of Reclamation rechanneled the Colorado River in the area of the subject land resulting in the active flow channel of the Colorado River being restricted to occupy only a portion of the subject land; that today part of the subject land lies outside of the artificially created active flow channel of the Colorado River on both the east and west sides of the channel. See Exhibit "G" below.

Sec. 3-19N, 22W
Subject Land in relation to present (Since 8-11-66) location of Colorado River.



Subject Land —
1962 Resurvey by Bur. of Land Management.

Fig. 4. Exhibit G.

5. At statehood (14 February 1912) the boundary between Arizona and Nevada lay a considerable distance west of the subject land. By virture of the Colorado River Boundary Compact, the boundary now lies down the center of the river as rechanneled by the Bureau of Reclamation in 1959.

After written briefs and oral arguments the trial court signed a judgment and decree in favor of the plaintiff, Bonelli Cattle Company, quieting title to the subject land. By "subject land" we mean the land in controversy to which the plaintiff is attempting to quiet title. In the judgment and decree the court found, *inter alia*, that the plaintiff had a proper "chain" of title to the subject land and:

> "(3) That according to the aforesaid Official Plat of Survey approved and filed June 29, 1906, the Colorado River did not pass through any portion of the lands hereinafter described nor border thereon but since said time the Colorado River has moved eastward to various and different points and parcels of said land until its channel was stablized in 1960 by rechannelization construction work conducted by the Department of the Interior through its Bureau of Reclamation where its stabilized man-made channel now crosses over the westerly portion of the lands hereinafter described and which man-made channel has been declared by Compact of the States of Nevada and Arizona approved by Congress June 16, 1961, Public Law 87-50, Eighty-seventh Congress, First Session (75 Stat. 93) to be the boundary between the States of Nevada and Arizona.
>
> "(4) That the AGREED STATEMENT OF FACTS AND ISSUES do not establish the dates, degree and manner of movement of the Colorado River, but such issues are immaterial in determination of the rights of the parties in this action.
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff BONELLI CATTLE

COMPANY, a California corporation, is the owner in fee simple of and is entitled to the possession, use and enjoyment of the following described real property situate in Mohave County, State of Arizona * * *."[6]

From this judgment defendant State Land Department appeals claiming title to the property between the property of plaintiff that remained after the eastward movement of the river as shown in Exhibit "G", supra, and the river as rechanneled.

DOES THE STATE OF ARIZONA OWN THE RIVER BED BY VIRTUE OF THE "EQUAL FOOTING" DOCTRINE?

It is the contention of the State of Arizona that under the "equal footing" doctrine, upon admission to the Union, the State of Arizona obtained title to the bed of the Colorado River. With this we must agree.

The Colorado River as it flows through this section of its reach is a navigable river, Arizona vs California, 283 U.S. 423, 75 L.Ed. 1154, 51 S.Ct. 522 (1931), and once determined to be navigable remains so. U.S. vs Appalachian Electric Power Co., 311 U.S. 377, 85 L.Ed.2d 43, 61 S.Ct. 291 (1940). See also Boulder Canyon Project Act, Ch. 42, 45 Stat. 1057 (1928), 43 U.S.C., Sec. 617, et seq. (1953).

In Pollard's Lessee vs Hagen, 44 U.S. (3 Howard) 212, 11 L.Ed. 565 (1845), the court held that the Constitution did not pass title of the beds of navigable waters to the United States, but reserved title to the several states. Because new states entered the Union on an *equal footing* with all the other states, title to the beds underlying navigable waters passes to the new states upon admission. Mumford vs Wardwell, 73 U.S. (6 Wall.) 423, 18 L.Ed. 756 (1867), Weber vs Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 21 L.Ed. 798 (1873), Shively vs Bowlby, 152

U.S. 1, 38 L.Ed. 331, 14 S.Ct. 548 (1893), Martin, et al. vs Waddell, 41 U.S. (16 Peters') 367, 410 L.Ed. 997 (1842), Hardin vs Jordan, 140 U.S. 371, 35 L.Ed. 428, 11 S.Ct. 808 [7] (1891), Kansas vs Colorado, 206 U.S. 46, 51 L.Ed. 956, 27 S.Ct. 655 (1906), Tyson vs State of Iowa, 8th Cir., 283 F.2d 802 (1960).

In addition, Congress recognized in Joint Res. No. 8, 21 August 1911, 37 U.S. Stat. 39, that Arizona was admitted on "equal footing" with the other states of the Union:

> *"Joint Resolution To admit the Territories of New Mexico and Arizona as States into the Union upon an equal footing with the original States.*
>
> *"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Territories of New Mexico and Arizona are hereby admitted into the Union *upon an equal footing* with the original States, in accordance with the terms of an Act entitled 'An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and State government and be admitted into the Union *on an equal footing* with the original States' commonly called the enabling Act approved June Twentieth, nineteen hundred and ten, and upon the terms and conditions hereinafter set forth. * * *." (emphasis ours)

The Arizona Supreme Court has recently stated in construing the title to the bed of the Colorado River:

> "We therefore hold that the State of Arizona holds *title* and *control* over the submerged land and navigable waters where the accident occurred." Morgan vs Colorado River Indian Tribe, 103 Ariz. 425, 427, 443 Pac.2d 421 (1968).

See also Cherokee Nation vs Oklahoma, 402 F.2d 739 (1968).

We therefore hold that under the "equal footing" doctrine

the State of Arizona obtained title to the river bed of the Colorado River as it existed in 1912 and at the location of the river in the instant case.[8]

WAS THE TRIAL COURT REQUIRED TO FIND WHETHER THE RIVER MOVED BY ACCRETION OR AVULSION?

The only conclusion that can be drawn from the agreed statement of facts and the attached maps and photographs in evidence is that sometime between the making of the original survey in 1905 and 1906 and 24 April 1938, the channel of the Colorado River moved in an undetermined manner to a position where the bed of the river ran over and occupied most of the subject land to which the plaintiff claims title. We are not in a position to determine from the record whether this change was accretive or avulsive nor do we believe the record was sufficient to enable the trial court to so determine.

It is contended by the appellant, State of Arizona, that before the trial court could determine the matter it was required to make a finding of fact whether the river had moved to and over plaintiff's land by accretion or avulsion. Appellant points out the general rule that where a change occurs in the location of the river through a process of erosion or accretion which is a natural and gradual movement of the river, the State would gain title to the bed of the river as it slowly moved losing title to the land that the river has abandoned. The owners of the bank would also lose or gain as the case may be during this slow, imperceptible process. We agree that this is the generally accepted law in regard to accretion in Arizona. Arizona vs Gunther & Shirley Company, 5 Ariz.App. 77, 83, 423 Pac.2d 352 (1967) (review denied 21 March 1967), State vs Jacobs, 93 Ariz. 336, 380 Pac.2d 998 (1963).

The State admits that as to avulsive changes neither the State as owner of the river bed nor the parties riparian [9] thereto lose or gain any interest or title to the land as changed. The general law in this regard is summarized in 65 C.J.S., Navigable Waters, § 86 (b) (1966):

> "Ordinarily an avulsion does not divest the title to lands covered, or uncovered, or shifted by the action of the stream, provided the former boundary can be determined or the land reclaimed within a reasonable time; nor does it confer title to lands uncovered by the water. If the land afterward reappears, the riparian owner retains his title thereto, provided the identity of the land can be established, although it has been held that, where land is obliterated by an avulsion, the owner loses title thereto. Further, a riparian owner may reclaim lands submerged by an avulsion either by natural or by artificial means. It has been held that, in applying the law of avulsion, it is immaterial whether a stream is navigable or non-navigable, since the same principles apply to each."

There is admittedly a minority view in this regard which holds that as to a navigable river the State acquires the title to the new bed, loses title to the old bed, with the abutting landowners acquiring title to the old bed. Manry vs Robison, 122 Tex. 213, 56 S.W.2d 438 (1932), Seabrook Land Company vs Lipscomb (Tex.), 331 S.W.2d 429 (1960), Maufrais vs State, 142 Tex. 559, 180 S.W.2d 144 (1944). This follows logically the view that the bed of a navigable river should be in the State in order to avoid any interference in the exercise of the State's sovereignty over the river:

> "The doctrine is well established that one of the incidents of sovereignty is control of navigable waters and ownership of land thereunder." 3 American Law of Property, § 12.27b (A. J. Casner ed. 1952)

But even if we were to adopt the majority view, we [10] do not believe that the trial court was required to make a determination of the matter of movement for the reason that where the facts are insufficient to establish the manner in which a navigable river has moved there is a presumption that such movement was by accretion rather than by avulsion. Nebraska vs Iowa, 143 U.S. 359, 36 L.Ed. 186, 12 S.Ct. 396 (1892), County of St. Clair vs Lovingston, 90 U.S. (23 Wall.) 46, 23 L.Ed. 59 (1874), Kitteridge vs Ritter, 172 Iowa 55, 151 N.W. 1097 (1915). This presumption is based in logic in that an avulsive change is usually an event of such magnitude that it is normally noted, if not by the riparian landowner, at least by persons in the vicinity and testimony is therefore easy to obtain as to the fact of the avulsive change. The fact that no evidence is available to indicate the manner of movement is in itself an indication that the movement was slow and imperceptible and therefore accretive rather than avulsive.

We therefore hold that there being a presumption that the movement was accretive there is a presumption that the State of Arizona owned the bed of the river as it had moved to and upon plaintiff's property.

WHAT WERE THE RIGHTS OF THE PARTIES WHEN THE RIVER WAS RECHANNELED?

The plaintiff was the owner of the land bordering the river before the river was rechanneled and was the riparian owner. Turner vs Schneider, 4 Mich.App. 388, 144 N.W.2d 848 (1966). The question before the Court is whether the State can claim title to the area between the river and petitioner's land after rechanneling. The law is well settled that in determining this question state law applies. Shively vs Bowlby, 152 U.S. 1, 38 L.Ed. 331, 14 S.Ct. 548 (1894). [11]

Although Arizona rejects absolutely the riparian doctrine as to use of water, Brasher vs Gibson, 101 Ariz. 326, 419 Pac.2d 505 (1966), riparian rights are recognized as far as land title is concerned, State of Arizona vs Gunther & Shirley Company, supra. One of the rights of a riparian landowner is access to the water, and to allow the state to retain title to the intervening property would allow the State to terminate this very valuable right. Colberg, Inc. vs State, 62 Cal.Rptr. 401, 432 Pac.2d 3 (1967). Two theories have been advanced to cover this situation. The first is called the "artificial accretion" doctrine. It has been stated:

> "• • • [T]here are authorities broadly according an upland owner the right to accretions resulting from artificial causes, or holding that the riparian owner is entitled to accretions when caused or aided by artificial conditions created by third persons in which he has no part." 65 C.J.S., Navigable Waters, § 82(2) (1966).

And:

> "• • • The court divided accretion or accession into three classes: (a) Accession made either by a retreating of the river or by the insensible addition of alluvion; (b) Accession made by the 'instantaneous casting up of the bed of the stream' above the water-level and against the upland, and (c) Accretions to the upland made by a stranger 'without the authority of government,' immediately contiguous to the upland so as to exclude the water from contact with the upland, and thus (unless these accretions belong to the uplands) deprive the owner of the upland of the opportunity to have the alluvial accretions. Accessions under group (a) would be the property of the upland owner. Accessions under group (b) would be the property of the owner of the bed of the stream, here the State of Alabama. Accessions under group (c) [12] would inure to the benefit of the riparian owner. • • •" State vs Gill, 259 Ala. 177, 180, 66 S.2d 141 (1953). See also

Esso Standard Oil Company vs Jones, 233 La. 915, 98 S.2d 236 (1957).

The doctrine of re-emergence has also been urged in cases of this kind:

"As an alternative theory of recovery, appellants raised a title claim under the doctrine of re-emergence. That doctrine rests upon 'easy identification' of riparian land 'lost' and 'found' again by re-emergence from the stream bed. These elements are not here present.

"We agree with the government:

'* * * In order for the doctrine to be applied in those states that recognize it, two things must occur; First, the water-course must move across and submerge riparian land so that land formerly non-riparian is made riparian; then the water-course must return to or near its original bed so that the riparian land that had been submerged is uncovered, or re-emerges.

* * * * *

'The United States' land to which the tract has accreted was riparian originally and one of the reasons for the doctrine of accretion is to allow that land to remain riparian. Philadelphia Co. v. Stimson, 223 U.S. 605, 624 [32 S.Ct. 340, 56 L.Ed. 570] (1912). * * *'."

Beaver vs United States, 350 F.2d 4, 11 (1965).

If the removal of the water from the land was by the process of reliction, which is gradual and analogous to accretion, the theory of artificial accretion would apply. If the water was suddenly removed by a man-made avulsion then the doctrine of re-emergence would apply. In either event we feel that the State may not take advantage of this man-made rechanneling to extinguish plaintiff's riparian land rights along this navigable river and deny plaintiff [13] title to the land previously owned.

Nothing we say herein should be construed to affect title to land west of the boundary in the State of Nevada or land along non-navigable streams.

Judgment affirmed.

James Duke Cameron, Judge. Concurring: Francis J. Donofrio, Presiding Judge, Department A, Henry S. Stevens, Judge. (Reported 11 Ariz. App. 412, 464 P. 2d 999.) [14]

In the Court of Appeals, State of Arizona

Division One

(Title Omitted in Printing)

MOTION FOR REHEARING

(Filed March 3, 1970)

Comes now the State of Arizona and the State Land Department, and respectfully moves this Court under Rule 47(a) of the Rules of the Supreme Court for rehearing of the Court's decision dated February 16, 1970, upon the following grounds:

I.

The decision of the Court is in direct conflict with the law relating to ownership of the bed of a navigable stream, as set forth in the cases cited by the Court at pages 7 and 8 of the decision.

II.

The Court correctly held that the State of Arizona under the "equal footing" doctrine obtained title to the river bed of the Colorado River as it existed in 1912 and at the location of the river in the instant case and that the legal presumption is applicable to find that the movement of the Colorado River prior to 1960 was by the natural process of accretion. The Court however erred in its holding regarding the effect of [1] the man-made changes subsequent to 1960 upon the state's title to the stream bed.

III.

The Court erred in hold: (1) that the man-made changes in the stream bed brought about by rechannelization of the Colorado River were the result of artificial accretion; and (2) that the sudden removal of the water from the bed of

the stream previously owned by the State of Arizona brought to bear the doctrine of re-emergence.

(Argument omitted)

Respectfully submitted,

GARY K. NELSON,
The Attorney General

/s/ DALE R. SHUMWAY
Dale R. Shumway
Special Assistant Attorney General
159 State Capitol Building
Phoenix, Arizona 85007
Attorneys for the Appellants [2]

In the Court of Appeals, State of Arizona

Division One

(Title Omitted in Printing)

ORDER

(Filed April 20, 1970)

The motion of the appellants for a rehearing and the response of the appellee together with the appellee's request for oral argument have been considered by the Court.

It Is Ordered denying the request for oral argument.

It Is Further Ordered denying the motion for rehearing.

FRANCIS J. DONOFRIO
Presiding Judge, Department A

In the Court of Appeals, State of Arizona

Division One

(Title Omitted in Printing)

PETITION FOR REVIEW

(Filed April 23, 1970)

Comes Now the State of Arizona, by and through its attorneys Gary K. Nelson, the Attorney General, and Dale R. Shumway, Special Assistant Attorney General and petitions for a review of this case by the Supreme Court of Arizona.

Dated: This 22nd day of April, 1970.

GARY K. NELSON
The Attorney General

By /s/ DALE R. SHUMWAY
Dale R. Shumway
Special Assistant Attorney General
189 State Capitol Building
Phoenix, Arizona 85007
Attorneys for Appellants

Supreme Court of the State of Arizona

No. 10030-PR (Supreme Court)
No. 1 CA-CIV 734 (Court of Appeals)
No. 5631 (Mohave County)

The State of Arizona, the State Land Department, a Department of the State of Arizona; Obed M. Lassen, State Land Commissioner of the State of Arizona, *Appellants*,

V.

Bonelli Cattle Company, a California corporation, *Appellee*.

May 13, 1970

The following action was taken by the Supreme Court of the State of Arizona on May 12, 1970, in regard to the above-entitled cause:

"Ordered: Petition for Review—DENIED."

Record returned to the Court of Appeals, Division One, this 13th day of May, 1970.

SYLVIA HAWKINSON, Clerk
MARY ANN HOPKINS, Deputy Clerk

In the Court of Appeals, State of Arizona

Division One

The State of Arizona, the State Land Department, a Department of the State of Arizona; Obed M. Lassen, State Land Commissioner of the State of Arizona, *Appellants,*

V.

Bonnelli Cattle Company, a California corporation, *Appellee.*

No. 1 CA-CIV 734, Department A—Arizona
Supreme Court Number 9115

MANDATE

(Filed May 15, 1970)

To: The Honorable Superior Court for Mohave County, Arizona, in relation to Cause No. 5631.

GREETINGS:

The above cause was presented in your Court and was brought before Division One of the Court of Appeals of the State of Arizona in the manner prescribed by law. This Court rendered its opinion and caused the same to be filed on the 16th day of February, 1970.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order dated the 12th day of May, 1970, the Arizona Supreme Court denied the petition for review, Supreme Court No. 10030-PR.

Now, Therefore, You Are Commanded that such proceedings be had in said cause as shall be required to comply with the opinion of this Court, a copy of the opinion being attached hereto.

Witness, the Honorable Francis J. Donofrio, Presiding Judge, Department A, Division One of the Court of Appeals of the State of Arizona, this 15th day of May, 1970.

(SEAL)

CLASSIE GANTT, Clerk

By _____

/s/ GLENNA L. DENTON
Deputy Clerk

Supreme Court of the State of Arizona

No. 10030-PR (Supreme Court)
No. 1 CA-CIV 734 (Court of Appeals)
No. 5631 (Mohave County)

The State of Arizona, the State Land Department, a Department of the State of Arizona; Obed M. Lassen, State Land Commissioner of the State of Arizona, *Appellants*,

V.

Bonelli Cattle Company, a California corporation, *Appellee*.

MOTION FOR RECONSIDERATION OF MOTION FOR REHEARING

(Filed May 26, 1970)

Come Now the State of Arizona and The State Land Department and respectfully moves this Court for reconsideration of this Court's Order denying the Petition for Review heretofore filed with the Court and for review of the decision heretofore rendered in this matter by Division One of the Court of Appeals.

Dated: This 26th day of May, 1970.

GARY K. NELSON
The Attorney General

By /s/ DALE R. SHUMWAY
Dale R. Shumway
Special Assistant Attorney General
159 State Capitol Building
Phoenix, Arizona 85007
Attorneys for Appellants

(Memorandum of Law omitted)

Supreme Court of the State of Arizona

(Title Omitted in Printing)

RESPONSE TO APPELLANTS' MOTION FOR RECONSIDERATION

(Filed May 28, 1970)

The Appellants by and through the Attorney General have filed in this Court a Motion for Reconsideration of its Order of May 12 denying Appellants' Petition for Review of the decision of Division One of the Court of Appeals dated February 16, 1970, and reported in 464 P. 2d 999.

The undersigned as the attorney for Appellee who has practised before this Court since 1934 and having the greatest respect and admiration for this Court and what it stands for, realizes that this Court in its discretion and under the authority granted to it by the Constitution and statutes has the power and authority to grant and honor such a motion. However, there appears to be a lack of precedent either by decision of this Court or by its Rules duly promulgated to authorize the entertainment of such a motion.

The undersigned agrees with eminent counsel for the Appellants that the question decided by the Honorable T. J. Mahoney, the presiding Judge of the Mohave County Superior Court and Division [1] One of the Court of Appeals is one of great importance not only to the State of Arizona but to its citizens similarly situated, but believes that this question has already been adversely decided against Appellants not only by the Court of Appeals but by this Court in considering Appellants' Petition for Review. It is respectfully submitted that Appellants' Motion is primarily based upon questions of fact and law already fully briefed and argued before the Court of Appeals and in

Appellants' Petition for Rehearing before the Court of Appeals and Appellee's response thereto.

If this Honorable Court should decide that it will entertain the Motion for Reconsideration, it is respectfully requested that Appellee be granted at least thirty days from the date of such Order granting the Motion within which to further answer and respond to Appellants' Memorandum in Support of their Motion.

In the event that Appellants' Motion is granted, Appellee joins with Appellants, due to the importance of this issue, in their Request for Oral Argument.

Respectfully submitted,

ELMER C. COKER
Luhrs-Central Building, Suite J
132 South Central Avenue
Phoenix, Arizona 85004
Attorney for Appellee [2]

Supreme Court of the State of Arizona
(Title omitted in printing)

June 4, 1970

The following action was taken by the Supreme Court of the State of Arizona on June 2, 1970 in regard to the above-entitled cause:

"Ordered: Motion for reconsideration of Petition for Review—Granted.

Further Ordered: Denying request for oral argument.

Further Ordered: Directing the Court of Appeals, Division No. 1, to recall the mandate.

Justice Jesse A. Udall did not participate in the determination of this matter."

SYLVIA HAWKINSON, Clerk

By /s/ LUCILLE BROOKS
Deputy Clerk

In the Court of Appeals, State of Arizona

Division One

The State of Arizona, the State Land Department, a Department of the State of Arizona; Obed M. Lassen, State Land Commissioner of the State of Arizona, *Appellants*,

v.

Bonelli Cattle Company, a California corporation, *Appellee*.

No. 1 CA-CIV 734, Department A

(Supreme Court No. 10030-PR

Mohave County Superior Court No. 5631)

(Filed June 8, 1970)

The Supreme Court of the State of Arizona entered the following order in its Cause No. 10030-PR, June 2, 1970:

"Ordered: Motion for reconsideration of Petition for Review Granted.

Further Ordered: Denying request for oral argument.

Further Ordered: Directing the Court of Appeals, Division 1, to recall the mandate."

Pursuant to the foregoing,

It Is Hereby Ordered recalling the mandate heretofore issued by the Court of Appeals, Division One, Department A;

It Is Further Ordered that the Clerk of the Superior Court for Mohave County, Arizona, return the record on appeal to the Clerk of the Court of Appeals, Division One.

JAMES DUKE CAMERON

Chief Judge

Supreme Court of the State of Arizona

No. 10030-PR (Supreme Court)
No. 1 CA-CIV 734 (Court of Appeals)
No. 5631 (Mohave County)

The State of Arizona, the State Land Department, a Department of the State of Arizona; Obed M. Lassen, State Land Commissioner of the State of Arizona, *Appellants*,

v.

Bonelli Cattle Company, a California corporation, *Appellee*.

June 18, 1970

The following action was taken by the Supreme Court of the State of Arizona on June 16, 1970, in regard to the above-entitled cause:

"Ordered: Submitted."

SYLVIA HAWKINSON, Clerk

By /s/ LUCILLE BROOKS
Deputy Clerk

In the Supreme Court of the State of Arizona

In Banc

The State of Arizona, the State Land Department, a Department of the State of Arizona; Andrew L. Bettwy, State Land Commissioner of the State of Arizona, *Appellants*,

v.

Bonelli Cattle Company, a California corporation, *Appellee*.

No. 10030-PR

(October 4, 1971)

Appeal from the Superior Court of Pinal (sic) County
Honorable T. J. Mahoney, Judge
Reversed with Directions

Opinion of the Court of Appeals, Division One
11 Ariz. App. 412, 464 P. 2d 999
Vacated

This Opinion was printed and is contained in Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona, appearing as Appendix A therein, pages 1a through 36a, inclusive, and is reported at 107 Ariz. 465, 489 P. 2d 699.

In the Supreme Court of the State of Arizona
(Title omitted in printing)

MOTION FOR REHEARING
(Filed January 17, 1972)

Comes Now the Appellee and, under Rule 9(a), respectfully moves this Court for a rehearing of the Court's decision rendered October 4, 1971, upon the following grounds:

—I—

That the Court erred in holding that the State's ownership of lands under the Colorado River extends from the center of the stream (Nevada boundary in this instance) to the high-water mark for the reason that the general rule is that the State's title to the bed and shore extends only to the line of the ordinary or mean high-water mark.

—II—

That the decision of the Court violates the principle that the court cannot legislate by judicial fiat, such power being reserved solely in the Legislature and the people through the initiative procedure of our State Constitution or by an amendment to the Constitution [1] itself, particularly when the Legislature is fully aware of the problem and in recent years has been advised by the Attorney General to enact legislation affecting titles along the Colorado River, which it has failed to do.

—III—

That the doctrine of equitable estoppel applies to the State of Arizona in its claim of ownership to the lands along the Colorado River, a navigable stream, particularly in view of the fact that the question herein is not that of preserving public lands since the State of Arizona never

had record title to the lands along the Colorado River, but it is now, for the first time, claiming title to the lands after large sums of money have been invested in the development thereof by record title owners in good faith and in reliance upon their titles, which titles have long been recognized as being valid, thereby barring and estopping the State of Arizona from asserting such claim.

—IV—

That the Court in its decision has apparently failed to realize the full effect and impact of the ruling it has handed down as it affects vested property rights along the banks of the entire area in the State of Arizona where the Colorado River flows, whose source of title was derived from patents issued by the United States of America dating back, in some instances, prior to statehood and which lands as a result of such title have been greatly improved and developed by the record owners involving millions of dollars, which improvements have been financed by lending institutions and title insured by title companies based upon the record title. [2]

—V—

That the decision of the Court constitutes a taking of private property for public use and purposes without just compensation in violation of the State Constitution and the Constitution of the United States of America.

—VI—

That the Court erred in holding as a matter of law that when the United States dredged and channelized the Colorado River for the express purpose of aiding and controlling navigation, flood control and conservation of water for irrigation purposes that the State's title to the ordinary

high-water mark of the old channel in its natural condition acquired through erosion was not affected thereby.

(Preface and Argument omitted)

Respectfully submitted,

ELMER C. COKER
Luhrs-Central Building, Suite J
132 South Central Avenue
Phoenix, Arizona, 85004
Attorney for Appellee [3]

In the Supreme Court of the State of Arizona

(Title omitted in printing)

January 26, 1972

The following action was taken by the Supreme Court of the State of Arizona on January 25, 1972 in regard to the above-mentioned cause:

"Ordered: Granting all petitions filed asking for leave to file Amici Curiae Briefs herein."
(Relative to the Motion for Rehearing)

CLIFFORD H. WARD, Clerk

By /s/ MARY ANN HOPKINS
Deputy Clerk

To:

Burton M. Apker, of Evans, Kitchel & Jenckes, P.C., 363 North First Avenue, Phoenix 85003

Elmer C. Coker, Esq., Luhrs-Central Building, Suite J, Phoenix 85004

Donald D. Paul, Esq., of Woolway, Paul & Magnus, 607 South Hobart Boulevard, Los Angeles, California 90010

Philip A. Edlund, Esq., of Fennemore, Craig, von Ammon & Udall, Suite 900, 411 North Central Avenue, Phoenix 85004

Leonard C. Langford, Mohave County Attorney, Courthouse, Kingman 86401

Dale R. Shumway, Special Assistant Attorney General, 159 State Capitol Building, Phoenix 85007

In the Supreme Court of the State of Arizona

(Title omitted in printing)

OBJECTION TO MOTION FOR REHEARING

(Filed January 31, 1972)

Come Now the appellants, pursuant to Rule 9 (b), and object to the Motion for Rehearing for the reason that all of the legal issues have been presented to the Court and based upon the facts, as agreed to by the parties in the trial Court, the decision of the Court has been entered. No new facts or law are available to the Court upon which to base a different decision if rehearing were granted. We, therefore, respectfully request the Court to deny the Motion for Rehearing.

Dated January 26, 1972.

DALE R. SHUMWAY
Dale R. Shumway
Special Counsel to the Attorney General
Udall, Shumway & Blackhurst
64 E. Broadway, Suite 4
Tempe, Arizona 85282
Attorney for Appellants

(Memorandum omitted)

In the Supreme Court of the State of Arizona

(Title omitted in printing)

(Filed April 13, 1972)

It is ordered: Motion for Rehearing denied.

Dated this 13th day of April, 1972.

/s/ JACK D. H. HAYS
Jack D. H. Hays
Chief Justice

In the Supreme Court of the State of Arizona

In Banc

The State of Arizona, the State Land Department, a Department of the State of Arizona; Andrew L. Bettwy, State Land Commissioner of the State of Arizona, *Appellants*,

v.

Bonelli Cattle Company, a California corporation, *Appellee*.

No. 10030-PR

(April 13, 1972)

Appeal from the Superior Court of Mohave County

Honorable T. J. Mahoney, Judge

SUPPLEMENTAL OPINION

This Opinion was printed and is contained in Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona, appearing as Appendix B therein, pages 1b through 10b, inclusive, and is reported at 108 Ariz. 258, 495 P. 2d 1312.

In the Supreme Court of the State of Arizona

No. 10030-PR

MANDATE

(Issued April 13, 1972)

To the Honorable the Superior Court of the State of Arizona in and for the County of Mohave

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Mohave, before you in a cause between

Bonelli Cattle Company, a California corporation,

Plaintiff,

vs.

The State of Arizona, the State Land Department, a Department of the State of Arizona; Obed M. Lassen, State Land Commissioner of the State of Arizona,

Defendants.

Cause No. 5631

said Superior Court entered its Judgment and Decree on the 17th day of July, 1967, in favor of the plaintiff and against the defendants. [1]

as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by defendants, agreeably to the law in such case made and provided fully and at large appears. This case was transferred from the Supreme Court to the Court of Appeals, Division One, on October 26, 1967.

And Whereas, in November, in the year of our Lord one thousand nine hundred and sixty-nine, the said cause came on to be heard before the said Court of Appeals, Division One, and was submitted for decision after argument of counsel.

On Consideration Whereof, it was on the 16th day of February, in the year of our Lord one thousand nine hundred and seventy, ordered by said Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby affirmed.

Whereupon, on April 23, 1970, The State of Arizona filed a Petition for Review by the Supreme Court, on consideration of which the said Supreme Court, on May 12, 1970, ordered that the Petition for Review be denied. On May 26, 1970, a Motion for Reconsideration of Petition for Review was filed by the State of Arizona and the State Land Department, on consideration of which the said Supreme Court, on June 2, 1970, ordered that the Motion be granted and the Petition for Review be submitted for decision. It was on the 4th day of October, 1971, ordered by this Court that the opinion of the Court of Appeals, Division One, be vacated, and the judgment of the Superior Court be reversed with directions to enter judgment quieting title in the State of Arizona from the Nevada boundary to the high water mark.

On January 17, 1972, a Motion for Rehearing was filed by Bonelli Cattle Company; and on April 13, 1972, the

Supreme Court ordered the Motion for Rehearing denied. It was on the 13th day of April, 1972, that this Court ordered that the decision directing the Superior Court of Mohave County to enter judgment quieting title in the State of Arizona from the Nevada boundary to the high water mark as supplement is approved.

You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

Witness, the Honorable Jack D. H. Hays, Chief Justice of the Supreme Court of the State of Arizona, the Thirteenth day of April, in the year of our Lord one thousand nine hundred and seventy-two.

CLIFFORD H. WARD, Clerk

By .....

Deputy Clerk of the Supreme Court of the State of Arizona

Supreme Court of the United States
Office of the Clerk
Washington, D. C. 20543

January 22, 1973

Elmer C. Coker, Esq.
Luhrs-Central Bldg., Suite J.
132 South Central Avenue
Phoenix, Arizona 85004

RE: BONELLI CATTLE CO. v. ARIZONA
No. 72-397

Dear Mr. Coker:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted. Mr. Justice Rehnquist took no part in the consideration or decision of this petition."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., *Clerk*

By /s/ HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
SEP 8 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

~~72-397~~

NO. _____

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

v.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents ~~and Joint Petitioners.~~

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

ELMER C. COKER
Luhrs-Central Building
Phoenix, Arizona 85004

LEONARD C. LANGFORD
Mohave County Attorney
Kingman, Arizona 86401

Attorneys for Petitioners

GARY K. NELSON, The Attorney General
By DALE R. SHUMWAY, Special Assistant Attorney General
State House
Phoenix, Arizona 85007

Attorneys for Respondents ~~and Joint Petitioners~~

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. _____

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

V.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents ~~and Joint Petitioners.~~

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

ELMER G. COKER
Luhrs-Central Building
Phoenix, Arizona 85004

LEONARD C. LANGFORD
Mohave County Attorney
Kingman, Arizona 86401

Attorneys for Petitioners

GARY K. NELSON, The Attorney General
By DALE R. SHUMWAY, Special Assistant Attorney General
State House
Phoenix, Arizona 85007

Attorneys for Respondents ~~and Joint Petitioners~~

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APPENDIX I - SEPARATE VOLUME

Reprint of an Article by Robert E. Lundquist Entitled *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion* Contained in Volume 14, Number 2, of the Arizona Law Review Published by the College of Law of the University of Arizona.

FILED SEPARATELY WITH THE CLERK

The Lower Colorado River Land Use Plan, a Report of the Lower Colorado River Land Use Advisory Committee, United States Department of the Interior, Stewart L. Udall, Secretary, January 1964.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. _____

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

V.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents ~~and Joint Petitioners.~~

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

~~The Attorney General of Arizona, on behalf of the State of Arizona, and its State Land Department and State Land Commissioner, respondents, and~~ The County Attorney of the County of Mohave, a political subdivision of the State of Arizona, and Bonelli Cattle Company, a California corporation, petitioners,

jointly petition for a writ of certiorari to review the judgments and decisions of the Supreme Court of Arizona rendered in this case respectively on October 4, 1971, and April 13, 1972.

OPINIONS BELOW

The Supreme Court of Arizona rendered two decisions.

The first decision of October 4, 1971, was on review on petition of the State of Arizona of the decision of the Court of Appeals of Arizona, Division 1, Department A, decided February 16, 1970, 11 Ariz. App. 412, 464 P. 2d 999, wherein the Court of Appeals affirmed the judgment of the trial court in quieting title against the State of Arizona and its State Land Department to the lands involved in this litigation situate along the Colorado River on the Arizona side of the river. This decision reversed the judgment of the trial court and vacated the opinion of the Court of Appeals and is reported

olority petition for a writ of certiorari to
review the judgments and decisions of the
Supreme Court of Arizona rendered in this
case respectively on October 4, 1971, and
April 27, 1972.

OPINIONS BELOW

The Supreme Court of Arizona ren-
dered two decisions.

The first decision of October 4,
1971, was on review on petition of the State
of Arizona of the decision of the Court of
Appeals of Arizona, Division 1, Department A,
decided February 16, 1970, 11 Ariz. App. 412,
465 P. 2d 399, wherein the Court of Appeals
affirmed the judgment of the trial court in
quieting title against the State of Arizona
and its State Land Department to the lands
involved in this litigation situate along
the Colorado River on the Arizona side of
the river. This decision reversed the judg-
ment of the trial court and vacated the opi-
nion of the Court of Appeals and is reported

at 107 Ariz. 465, 489 P. 2d 699 (Appendix A, *infra*).

Upon timely motion for rehearing by Bonelli, in which proceeding several amici curiae briefs were filed including the County of Mohave supporting the motion for rehearing, the Supreme Court of Arizona on April 13, 1972, in effect denied the motion for rehearing by supplementing its previous decision. This latter decision is reported at 108 Ariz. 258, 495 P. 2d 1312 (Appendix B, *infra*).

In both Supreme Court decisions Justice Lockwood dissented and filed an opinion in both decions (Appendix A and B, *infra*).

JURISDICTION

The final decision of the Supreme Court of Arizona was filed April 13, 1972. On joint application of petitioners and respondents, Mr. Justice Douglas by order dated June (*sic*) 12, 1972, extended the time for filing a petition for a writ of certiorari to and including September 9, 1972.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

The questions presented herein are a result of a direct conflict of the decisions of the Arizona Supreme Court (Appendix A and B, *infra*) with the decision in United States v. Claridge, reported in 279 F. Supp. 87, affirmed by the United States Court of Appeals for the Ninth Circuit reported in 416 F. 2d 933, certiorari denied March 2, 1970, 397 U. S. 961, 25 L. Ed. 2d 253, 90 S. Ct. 994 (Appendix C, *infra*). These decisions involved ownership and changes of ownership of lands along the Colorado River by virtue of its past natural movements and later changes of the channel as a result of the construction of Hoover Dam and the rechannelization of the Colorado River by the United States under the Boulder Canyon Project Act passed by Congress in 1928 (43 U. S. C. 617 et seq.). While the Claridge de-

The jurisdiction of this Court is invoked under 28 U.S.C. 1251(b)(3).

QUESTIONS PRESENTED

The questions presented herein are the result of a direct conflict of the decisions of the Arizona Supreme Court (Appendix A and B, infra) with the decision in United States v. Ohio, reported in 279 F. Supp. 97, affirmed by the United States Court of Appeals for the Ninth Circuit reported in 416 F. 2d 989, certiorari denied, 396 U.S. 1009, 90 S. Ct. 561, 25 L. Ed. 2d 673 (Appendix C, infra). These decisions involved ownership and change of ownership of lands along the Colorado River by virtue of the past natural movements and later changes of the channel as a result of the construction of Hoover Dam and the reclamation of the Colorado River by the United States under the Boulder Canyon Project Act passed by Congress in 1928 (43 U.S.C. 617 et seq.). While the Ohio decision

cision did not involve an area where rechannelization had occurred, the difference between the high water mark and the bed of the Colorado River as fixed by Claridge and as fixed by the Arizona Supreme Court decisions as they affect the Bonelli land is clearly shown on Appendix D, *infra*, and attached hereto, p. 33.

1. Whether the ordinary high water mark and bed of a navigable river is established by and includes all of the area below the line created by the water during the usual high flow stage of the river's annual cycle.

2. Whether changes in the flow pattern of a navigable river caused by the construction of dams and rechannelization of the stream bed by the United States changes or alters the ordinary high water mark for purposes of changing or altering the ownership of the exposed lands resulting from the construction of such works.

3. Whether Federal or State law

controls the ownership of land gained or lost by accretion on property conveyed by the United States prior to statehood.

4. Whether the decisions of the Arizona Supreme Court affects title to Federal and Indian lands as well as private lands bordering the Colorado River.

5. Whether the latter decision of the Arizona Supreme Court dated April 13, 1972, misconstrues or misinterprets the Submerged Lands Act of Congress as a grant by Congress to the States of lands formerly beneath navigable waters up to the ordinary high water mark without recognizing that said Act specifically exempts from the effect thereof any lands to which title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person (43 U. S. C. 1301 (f)).

6. Whether the respective decisions of the Arizona Supreme Court constitute a taking of property by the State of Arizona

controls the ownership of land gained or
lost by accretion or property conveyed by
the United States prior to statehood.

4. Whether the decisions of the
Arizona Supreme Court affects title to Fede-
ral and Indian lands as well as private
lands bordering the Colorado River.

5. Whether the latter decision
of the Arizona Supreme Court dated April 13,
1972, misconstrues or misinterprets the Sub-
merged Lands Act of Congress as a grant by
Congress to the States of lands formerly
beneath navigable waters up to the ordinary
high water mark without recognizing that
said Act specifically exempts from the ef-
fect thereof any lands to which title to the
beds of such streams was lawfully patented
or conveyed by the United States or any State
to any person (43 U. S. C. 1301 (f)).

6. Whether the respective decisions
of the Arizona Supreme Court constitute a
taking of property by the State of Arizona

without compensation having been made therefor in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Article 2, Section 17, Arizona Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Submerged Lands Act of Congress enacted in 1953, 43 U. S. C. 1301 et seq.

The Act of Congress of June 17, 1902, 32 Stat. 388, and the unpublished Reclamation Withdrawal Order of January 13, 1903, issued pursuant thereto, a certified copy of the entire Order being filed separately with the Clerk and pertinent parts thereof being set forth herein on page 34 et seq.

The Boulder Canyon Project Act enacted in 1928, 43 U. S. C. 617 et seq.

The constitutional and ordinance provisions involved are:

The Fifth and Fourteenth Amendments to the Constitution of the United States.

The Enabling Act of Arizona, Section 20, Second.

Article 2, §17, Arizona Constitution, and Section Fourth, Article XX, of the Arizona Constitution.

The following are the pertinent parts

without compensation having been made therefor in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Article 2, Section 17, Arizona Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Submerged Lands Act of Congress enacted in 1953, 43 U. S. C. 1301 et seq.

The Act of Congress of June 17, 1902, 32 Stat. 388, and the Unpublished Reclamation Withdrawal Order of January 13, 1903, issued pursuant thereto, a certified copy of the entire Order being filed separately with the Clerk and certain parts thereof being set forth herein on page 34 et seq.

The Boulder Canyon Project Act enacted in 1928, 43 U. S. C. 617 et seq.

The constitutional and ordinance provisions involved are:

The Fifth and Fourteenth Amendments to the Constitution of the United States.

The Enabling Act of Arizona, Section 20, Second.

Article 2, §17, Arizona Constitution, and Section Fourth, Article XX, of the Arizona Constitution.

The following are the pertinent parts

of the Submerged Lands Act of Congress enacted in 1953. C. 65, Title I, §2, 67 Stat. 29, now appears as 43 U. S. C. Section 1301 and provides in pertinent part:

"§1301. Definitions

"When used in this chapter --

"(a) The term 'lands beneath navigable waters' means --

"(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

* * * * *

"(f) The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;".

C. 65, Title II, § 3, 67 Stat. 30, now appears as 43 U. S. C. Section 1311 and provides in

of the Submerged Lands Act of Congress, enacted in 1953, c. 65, Title I, § 2, 67 Stat. 29, now appears as 43 U. S. C. Section 1301 and provides in pertinent part:

"§1301. Definitions

"When used in this chapter --

"(a) The term 'lands beneath navigable waters' means --

"(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

* * * * *

"(c) The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;".

C. 65, Title IX, § 3, 67 Stat. 30, now appears as 43 U. S. C. Section 1311 and provides in

pertinent part:

"§1311. Rights of the States - Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

"(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;".

C. 65, Title II, §5, 67 Stat. 32, now appears as 43 U. S. C. Section 1313 and provides in pertinent part:

"§1313. Exceptions from confirmation and establishment of States' title, power and rights

"There is excepted from the operation of section 1311 of this title --

"(a) * * * all lands expressly retained by or ceded to the United States when the State entered the Union * * * ".

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The Boulder Canyon Project Act was enacted by Congress December 21, 1928. C. 42 §1, 45 Stat. 1057, now appears as 43 U. S. C. Section 617 and the pertinent part provides:

"§617. Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain

"For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States * * * the Secretary of the Interior * * * is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir * * * and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam * * * *".

The pertinent parts of the Fifth and Fourteenth Amendments to the Constitution of the United States are:

"Amendment V. No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."

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The following is the pertinent part of Article 2, Section 17, Constitution of Arizona:

"Section 17. * * * No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner * * * ."

The pertinent part of Section 20, Second, of the Act of June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579, which enabled the people of the Territory of Arizona to form a constitution and state government is:

"Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute

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and the pertinent part of the Ordinance provided by the Arizona Constitution, Article XX, Section Fourth, is:

"Fourth. Public lands; Indian lands

"Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

STATEMENT

The Colorado River was declared to be a navigable stream by this Court in Arizona v. California, 283 U. S. 423, 75 L. Ed 1154 (1930). The Colorado River re-emerges from Lake Mead through Hoover Dam and winds its way over 500 miles to the Gulf of California, forming the western

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boundary of the State of Arizona. In certain areas along the river, the boundary between Arizona and the States of California and Nevada is set by agreement; thus the middle thread of the river may or may not coincide with the actual boundary. In Arizona the river's course is bordered by the Counties of Mohave and Yuma.

The Bonelli land in question was originally surveyed in 1905 and 1906 and the official plat of survey was approved by the Surveyor General of the United States Department of the Interior on June 29, 1906. At that time the Colorado River was entirely to the west of the subject land and did not in any way encroach upon said land (see Appendix D, *infra*). Pursuant to the Act of Congress approved July 27, 1866, 14 Stat. 292, the subject lands together with other lands were conveyed by patent issued by the United States on November 5, 1910, to The Atlantic and Pacific Railroad Company, pre-

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On February 14, 1912, the State of Arizona was admitted to the Union. Since the original survey and conveyance of the subject land by the United States the Colorado River has moved eastward and has in the past covered much, if not all, of the subject land. Immediately prior to 1959 the active flow channel of the Colorado River occupied almost all of the subject land with the exception of a small parcel in the southeast corner thereof (Appendix D, *infra*).

In 1959 the Bureau of Reclamation rechanneled the Colorado River in the area of the subject land resulting in the active flow of the Colorado River being restricted to occupy only a portion of the subject land. Today part of the subject land lies outside of the artificially created active flow channel of the Colorado River on both the east

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and west sides of the channel or on the Arizona and Nevada sides, respectively.

At statehood the boundary between Arizona and Nevada lay a considerable distance west of the subject land (Appendix D, *infra*). By virtue of the Colorado River Boundary Compact between the States of Arizona and Nevada approved by Congress June 16, 1961, Public Law 87-50, Eighty-seventh Congress, First Session (75 Stat. 93) the boundary at this point now lies down the center of the river as rechanneled by the Bureau of Reclamation in 1959.

On or about April 13, 1962, the Bonelli Cattle Company filed an action in the Superior Court of Mohave County, Arizona, against the State of Arizona and its State Land Department and State Land Commissioner to quiet title to the subject land and the cause was submitted to the court on an agreed statement of facts. Thereafter the court on July 17, 1967,

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entered its judgment and decree quieting title to the subject lands in favor of the plaintiff Bonelli and against the defendants the State of Arizona and its State Land Department and State Land Commissioner. From this decision the defendants appealed to the Court of Appeals of Arizona, Division 1, Department A, and the Court of Appeals by decision dated February 16, 1970, reported at 11 Ariz. App. 412, 464 P. 2d 999, affirmed the judgment and decree of the superior court. Upon application of defendants the Supreme Court of Arizona granted review and by its decisions of October 4, 1971, and April 13, 1972, reversed the judgment of the trial court and vacated the decision of the Court of Appeals. By said decisions the Supreme Court of Arizona in effect held that the State of Arizona had acquired title to the Bonelli land by virtue of the fact that the Colorado River had moved in an eastward direction in a slow and imperceptible man-

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ner during which time the State of Arizona acquired title to the land and that the channelization of the Colorado River confining its flow to a part of the old bed did not cause a loss of the State's ownership. The Supreme Court in its decisions established the State's ownership to the land once covered by the Colorado River to the *high water mark*.

Upon timely petition for rehearing by Bonelli and after extensive briefs had been filed by Bonelli, the Attorney General and eight amici curiae, including the County Attorney of Mohave County (although he is not named in the reported decision), the Supreme Court of Arizona on April 13, 1972, in effect denied Bonelli's petition for rehearing by supplementing its first decision, once again holding that the State's title extended to the *high water mark*.

The Claridge decision on the questions involved herein was rendered November

7, 1966, by Judge Craig of the United States District Court for the District of Arizona, 279 F. Supp. 87, and the affirming decision of the United States Court of Appeals Ninth Circuit, 416 F. 2d 933, was issued September 19, 1969. These decisions were never considered by the Court of Appeals of Arizona nor the Supreme Court of Arizona in its first decision. However on the petition for rehearing before the Supreme Court of Arizona Bonelli and amici curiae called to the court's attention and urged the court that its first decision of October 4, 1971, as it related to the extent of the State's ownership of the land was in direct conflict with the decision of the United States District Court for the District of Arizona in Claridge, 279 F. Supp. 87, and affirmed by the United States Court of Appeals Ninth Circuit, 416 F. 2d 933, and that therefore the Arizona Supreme Court's decisions should be modified accordingly.

The effect of the Claridge decisions

was brushed off by the Supreme Court of Arizona in the following language: "It should be made clear that Arizona's title as against private persons is in no way controlled by the opinion in United States v. Claridge, 279 F. Supp. 87, aff'd 9th Cir., 416 F. 2d 933." (page 1314, 495 P. 2d).

The conflict between the two decisions of the Arizona Supreme Court and the Claridge decision as to what constitutes the "high water mark" is clearly shown on Appendix D, *infra*, and it will be noted that the line established by the Arizona Supreme Court completely wipes out all of Bonelli's title and invades about one-half of Section 2 to the east, which is Federal land.

As a result of these conflicting decisions in both cases where the State of Arizona was a party, we have a situation which presents a critical dilemma as to the ownership of land along the Colorado River

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REASON FOR GRANTING WRIT

I. *Conflict of Authorities.*

As stated before, there is a direct conflict between the two decisions of the Arizona Supreme Court and the Federal courts relating to the extent of the State's ownership of land along the Colorado River. In other words, the State's ownership as against the United States under the Claridge decision extends to one line; on the other hand, the State's ownership under the Arizona Supreme Court decisions as it applies against individuals extends to another line much greater in depth (see Appendix D, *infra*).

The Claridge case involves almost an identical factual situation with Bonelli and was one in which the State of Arizona was a party and in which the State of Arizona petitioned this Court for a writ of certiorari, which petition was denied March 2, 1970, 397 U. S. 961, 25 L. Ed. 2d 253, 90

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REASONS FOR GRANTING WRIT

1. Conflict of Authorities.

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S. Ct. 994. Questions numbered 1 and 2 herein presented are identical in substance with Questions numbered 1 and 3 presented by the State of Arizona in its opening brief before the Ninth Circuit Court of Appeals in Claridge and in the petition for certiorari in this Court. Both questions were decided adversely to the State. However, as noted, the Supreme Court of Arizona in its decisions holds just the opposite.

Furthermore, the Arizona Supreme Court decisions are in direct conflict with the decision of this Court in Hughes v. Washington, 389 U. S. 290, 19 L. Ed. 2d 530, 88 S. Ct. 438, decided December 11, 1967, wherein Mr. Justice Black delivered the opinion of the Court in reversing the Supreme Court of Washington and unequivocally holds that *federal, not state laws*, control the ownership of land, called accretion, on property conveyed by the United States prior to statehood. It is clear from reading this opinion

that the converse would be true; that is, *that federal law, and not state law, controls the ownership of land lost by accretion where the land was conveyed by the United States prior to statehood*, as is the fact in the case at bar.

II. *Importance of the Issue.*

Since the latter decision of the Arizona Supreme Court of April 13, 1972, there has been published in Volume 14, Number 2, of the Arizona Law Review published by the College of Law of the University of Arizona an article by Robert E. Lundquist entitled *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion.*

While respective counsel to this petition may not fully agree or concur with Mr. Lundquist's article or his conclusions, we all unanimously agree that the article points to the fact that we have a very serious problem at hand as a result of the conflict between the Arizona Supreme

Court decisions and the decisions of this Court and subordinate Federal courts. Counsel believe that this article is of such significance and importance that it should be filed as a separate Appendix and therefore a reprint of the article is being separately filed as Appendix I.

Mr. Lundquist states on the first page of his article that dredging operations by the Bureau of Reclamation to rechannel parts of the Colorado River have already surfaced over 2,700 acres of land between the natural river bank and the narrower new channel and that *future dredging will expose more land*. Therefore, as dredging continues by the Bureau of Reclamation other land titles will be affected (page 316 Arizona Law Review, Appendix I).

According to the records of the Arizona State Office of the Bureau of Land Management, United States Department of the Interior, there are 273 miles of shoreline

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in Arizona along the Colorado River. Of this shoreline, 87 miles or 32% is controlled by the Bureau of Reclamation and the Bureau of Land Management; 59 miles or 22% is owned by Indians; 71 miles or 26% is controlled by the Bureau of Sports, Fisheries and Wildlife; and 45 miles or 16% is privately owned or owned by the State of Arizona. This statistical data and overlay is attached as Appendix E, *infra*.

In 1971 the Department of Economic Planning and Development-Planning Division-of the State of Arizona published an official report entitled *Ownership and Administration of Public Lands in Arizona* (see page 317 Arizona Law Review, Appendix I). As a pocket part of this official report is a map of the State of Arizona showing public land ownership in Arizona as of 1971. The land status was obtained from the Arizona State Office of the Bureau of Land Management, United States Department of the Interior.

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This map clearly shows the ownership of land along the Colorado River and is filed as Appendix F, *infra*.

Of the 45 miles or 16% of private and State land, Appendix E, *infra*, it is agreed that by virtue of the Reclamation Withdrawal Order of January 13, 1903, and subsequent withdrawal orders the State's ownership constitutes a very small portion of the area.

Justice Lockwood in her dissenting opinion of the first decision of October 4, 1971, at 489 P. 2d 706, mentions the agricultural developments bordering the Colorado River and its importance. The agricultural development is within Yuma County. However, millions of dollars have been expended by private capital and plans for the expenditure of other millions of dollars by public agencies, the Indians, the Federal government and individuals on lands along the Colorado River in Mohave County are of great

significance. This Court can take judicial notice of the birth and development of the great city along the Colorado River in Mohave County known as Lake Havasu City purchased and developed by the McCullough interests at which place at the cost of several million dollars McCullough purchased, transported and installed the London Bridge.

The Department of the Interior has made extensive studies and plans for the development of public and Indian lands along the Colorado River for recreational purposes which will make it one of the greatest recreational areas in the entire continental United States. (See *The Lower Colorado River Land Use Plan, a Report of the Lower Colorado River Land Use Advisory Committee, United States Department of the Interior, Stewart L. Udall, Secretary, January 1964.* Extra copies of this document are not available because it is out of print, and therefore only one copy is available for filing with the

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Clerk. This plan as will be indicated therein is still in full force and effect.)

While Justice Struckmeyer in his latter opinion remarks on page 1313 of the reported decision, 495 P. 2d, that the economic impact of the court's decision is a matter of legislative consideration rather than the concern of the court, one of the very main reasons for this joint petition by opposing counsel is due to the fact that the Legislature of Arizona cannot intelligently consider legislation for the relief of private owners of land along the shoreline of the Colorado River due to the conflict between the decisions of the Arizona Supreme Court, this Court and those of subordinate Federal courts, particularly the conflict that now exists between the Claridge decision and the Bonelli decisions as to the extent of the State's ownership. We respectfully submit that only this Court by granting certiorari can provide the

solution.

The statistical data furnished by the Bureau of Land Management, Appendix E, *infra*, relate only to shoreline land without any information as to the depth of that shoreline land. In other words, an examination of Appendix D, *infra*, clearly shows that the extent of the Claridge decision would only affect a quarter mile or at the most a half mile of Bonelli shoreline land while the effect of the Arizona Supreme Court's decisions embrace all of the Bonelli land and extends a mile or more covering half of the Federal land in Sections 10 and 2. In some cases where the Colorado River is known to have flowed at one time for a distance of 4 or 5 miles to the east of the present channelized stream, the State's title would extend to this point.

The Arizona Supreme Court cited the Submerged Lands Act, 43 U. S. C., 1301 et seq., in its supplemental opinion (495 P. 2d

1312) as authority for title vesting in the State, but the Court refused to recognize that this same Act exempted from the provisions thereof any lands to which title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person, or to which title had been retained by or ceded to the United States when Arizona entered the Union.

Furthermore the Arizona Supreme Court in both of its decisions completely ignored the mandatory provisions of Section 20, Second, of the Enabling Act of Arizona and the effect of the unrevoked Reclamation Withdrawal Order of January 13, 1903, and subsequent withdrawals both before and after statehood which withdrew land along the Colorado River from any form of entry; particularly the January 13, 1903, withdrawal which withdrew 6 miles of lands from all forms of entry except homestead entries (not applicable here) from the center of the Colorado

River eastward. These withdrawals and the mandatory provisions of the Enabling Act and the Arizona Constitution accepting the same casts a serious cloud upon the validity of the Supreme Court of Arizona's decisions and as a result a serious cloud on any title to lands along the Colorado River now in existence or *which hereafter may be granted by the United States.*

CONCLUSION

Unless this Court takes jurisdiction and grants certiorari, it is submitted that the owners of patented lands along the Colorado River, the Indians and the Federal government will be in a complete state of confusion and apprehension.

Under the Arizona Supreme Court decisions there is no way for the owner of private land along the Colorado River to definitely determine how much of his land has been taken by the State of Arizona or affected by the decisions. As a result of the Arizona Su-

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preme Court decisions, no person can with any degree of safety and assurance of stability develop and improve his land at any one given point because of the vagueness and uncertainty of the decisions and the conflict with Claridge and of contemplated future channelization of the Colorado River by the Bureau of Reclamation to stabilize the river flow.

The Arizona Supreme Court by its decisions has adopted a rule of property which casts serious constitutional doubt upon the powers of the Legislature of Arizona to change or modify unless these decisions are reversed or at least modified and clarified by this Court.

It is therefore respectfully submitted that this petition for the writ of certiorari should be granted and counsel be permitted to file their respective briefs on the questions raised herein.

Respectfully submitted,

ELMER C. COKER
Luhrs-Central Building, Suite J
132 South Central Avenue
Phoenix, Arizona, 85004
Attorney for Petitioner Bonelli Cattle Company

LEONARD C. LANGFORD
Mohave County Attorney
Mohave County Court House
Kingman, Arizona, 86401
Attorney for Petitioner County of Mohave

[redacted]

Respectfully submitted,

ELMER C. COKER
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132 South Central Avenue
Phoenix, Arizona, 85004
Attorney for Petitioner Bonelli Cattl

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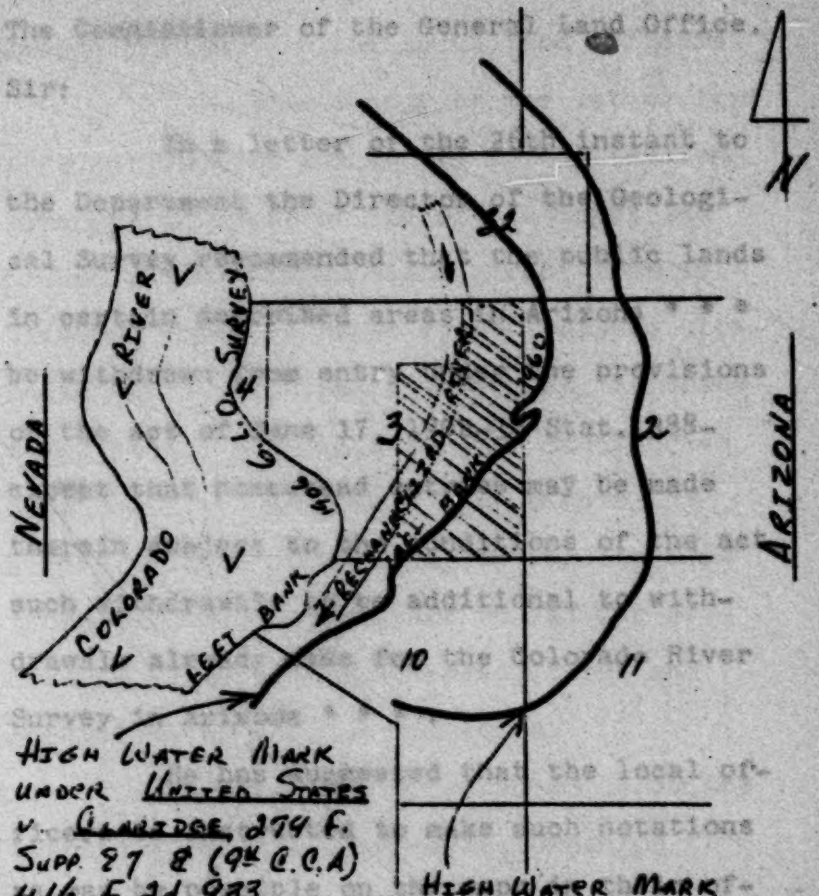
SUBJECT LAND -- PART OF SECTION 3, T. 19N., R. 22 W., G.& S. R.B.M.

▨ —— SUBJECT LAND



HIGH WATER MARK UNDER UNITED STATES V. CLAIRDGE, 274 F. SUPP. 87 & (9TH C.C.A) 416 F. 2d 983

HIGH WATER MARK UNDER ARIZONA V. BOURKE CATTLE COMPANY, 495 P. 2d 1312

Arizona
Colorado River
Yuma
Gila River
Yuma
Gila River
Yuma
Yuma
Yuma

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

January 31, 1903.

J. I. P.

The Commissioner of the General Land Office.

Sir:

In a letter of the 26th instant to the Department the Director of the Geological Survey recommended that the public lands in certain described areas in Arizona * * * be withdrawn from entry under the provisions of the act of June 17, 1902-32 Stat. 388- except that homestead entries may be made therein subject to the conditions of the act, such withdrawals to be additional to withdrawals already made for the Colorado River Survey in Arizona * * * .

He has suggested that the local officers be instructed to make such notations as may be possible on the maps in their offices, and has recommended with reference to the unsurveyed townships that the withdrawals should be noted in the tract books

of your office where the townships fall in tract books already opened and that whenever possible new tract books should be opened to contain the others and that like action be taken by the local land officers.

I enclose a copy of the letter for your information and hereby direct the temporary withdrawal of the public lands included in the descriptions given, from settlement, entry or other form of disposition under the public land laws except the homestead laws. All lands entered and entries made under the homestead laws within the limits of this withdrawal, during its continuance, shall be subject to all the provisions, limitations, charges, terms and conditions of the act mentioned.

You are also directed to cause the withdrawal of the unsurveyed townships to be noted as recommended if practicable.

Very respectfully,

E. A. HITCHCOCK
Secretary

of your office where the township ta
tract books already opened and that w
ever possible new tract books should
opened to contain the others and that
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tinuance, shall be subject to all the
visions, limitations, charges, terms
conditions of the act mentioned.

You are also directed to cause
withdrawal of the unsurveyed townships
be noted as recommended if practicable.

Very respectfully,

E. A. HITCHCOCK
Secretary

Request for additional withdrawals, Colorado River Survey.

Jan. 26, 1903.

The Honorable,

The Secretary of the Interior,

Washington, D. C.

Sir:

As a result of further examinations in the field I have the honor to request additional withdrawals to those already made for the Colorado River survey in Arizona * * *, under the provisions of the act of June 17, 1902 (32 Stat. 388), as stated below:

COLORADO RIVER SURVEY IN ARIZONA-G AND SRM

Ts. 7, 8, 10, 11, 12, 13 S, R. 20 W.

T. 11 S., Rs. 20, 21, 22, 23, 24 and 25 W.

T. 12 S., Rs. 19, 20, 21, 22 and 23 W.

T. 13 S., Rs. 18, 19 and 20 W.; also

All lands in Arizona lying within six miles of the Colorado River, west of the 114th Meridian.

* * * * * * *

Request for additional withdrawals, C
River Survey.

Jan. 25, 190

The Honorable,

The Secretary of the Interior,

Washington, D. C.

Sir:

As a result of further examin
In the field I have the honor to requ
additional withdrawals to those alrea
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* * *, under the provisions of the ac
June 17, 1902 (32 Stat. 388), as amen
low:

COLORADO RIVER SURVEY IN ARIZONA-G AND

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T. 11 S., Rs. 20, 21, 22, 23, 24 and 2

T. 12 S., Rs. 19, 20, 21, 22 and 23 W.,

T. 13 S., Rs. 18, 19 and 20 W.; also

all lands in Arizona lying within six
of the Colorado River, west of the 114
Meridian.

* * * * * * *

In regard to the withdrawal of these unsurveyed townships and the lands along the Colorado River in Arizona * * *, I desire to state that the land being unsurveyed, it is impossible to make a more definite description. The most important object to be obtained by this withdrawal is to prevent the attachment of rights for reservoirs and canals, which will take water from the river for irrigation, power or other purposes, and it is understood that the progress sheets which are kept up in the General Land Office, will show the proposed withdrawals and make it possible to decide whether an application for such purposes may be in conflict therewith. It is suggested that the Commissioner of the General Land Office be asked to instruct the local land officers to make such notations as may be possible on the Land Office maps in their offices which are consulted in connection with applications

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It is suggested that the Commissioner
the General Land Office be asked to in
struct the local land officers to make
such notations as may be possible on t
Land Office maps in their offices whic
communicated in connection with applicati

for rights of way over unsurveyed lands, as may show the locations of these withdrawals.

As to the unsurveyed townships described, it is recommended that the Commissioner of the General Land Office should note the withdrawals in the tract books in case the townships fall in books already opened and whenever possible should open new tract books to contain the others; also that a similar action be taken by the local land offices.

It is recommended that the public land in the area described be withdrawn from entry, except that homestead entries may be made therein subject to the conditions prescribed in the act.

Very respectfully,

(Name does not appear)

Director.

SUPREME COURT, U. S.

FILED

SEP 8 1972

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

~~72~~ 397

NO. _____

BONELLI CATTLE COMPANY, A California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

V.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents [redacted].

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

(APPENDIX A THROUGH F)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. _____

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners

V.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

(APPENDIX A THROUGH F)

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Appendix F. Map of the State of Arizona Showing Public Land Ownership in Arizona as of 1971 (Land Status Obtained From the Arizona State Office of the Bureau of Land Management, United States Department of Interior)------ 1f

APPENDIX I - SEPARATE VOLUME

Reprint of an Article by Robert E. Lundquist Entitled *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion* Contained in Volume 14, Number 2, of the Arizona Law Review Published by the College of Law of the University of Arizona.

FILED SEPARATELY WITH THE CLERK

The Lower Colorado River Land Use Plan, a Report of the Lower Colorado River Land Use Advisory Committee, United States Department of the Interior, Stewart L. Udall, Secretary, January 1964.

APPENDIX - SUBJECT INDEX CONTINUED

Appendix F. Map of the State of Arizona showing Public Land ownership in Arizona as of 1971. (Land status obtained from the Arizona State Office of the Bureau of Land Management, United States Department of Interior).------

APPENDIX I - SEPARATE VOLUME

Reprint of an Article by Robert E. Lundquist Entitled Article Entitled Adjudication Of Arizona Land: Extended and the Doctrine of Acceptance Contained in Volume 10, Number 2, of the Arizona Law Review Published by the College of Law of the University of Arizona.

FILED SEPARATELY WITH THE CLERK

The Lower Colorado River Land Use Plan, a Report on the Proposed Future Land Use Adjustments, United States Department of the Interior, Robert L. Black, Secretary, January 1964.

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

En Banc

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Appellants,

v.

BONELLI CATTLE COMPANY, a California corporation,

Appellee.

No. 10030-PR
(October 4, 1971)

Appeal from the Superior Court of Pinal (sic) County

Honorable T. J. Mahoney, Judge

Reversed with Directions

Opinion of the Court of Appeals, Division One
11 Ariz. App. 412, 464 P. 2d 999

Vacated

Gary K. Nelson
The Attorney General Phoenix

by Dale R. Shumway
Special Assistant Attorney General
Phoenix

Attorneys for Appellants

Elmer C. Coker Phoenix
Attorney for Appellee

STRUCKMEYER, Chief Justice

This action was brought by Bonelli Cattle Company, a corporation, to quiet title to certain lands lying within the bed of the Colorado River in Mohave County, Arizona. The Superior Court on an agreed statement of facts entered judgment quieting title against the State and the judgment was affirmed by the Court of Appeals, 11 Ariz. App. 412, 464 P. 2d 999. Opinion of the Court of Appeals vacated. Judgment of the Superior Court reversed.

The issue to be determined is whether ownership of Arizona in the beds and banks of the Colorado River acquired by erosion has been lost because dredging has channelized the water of the river, confining it to a part of the bed.

Bonelli claims as the owner the East half of Section 3, Township 19 North, Range 22 West of the Gila and Salt River Base and

Meridian. It acquired title by deed dated August 12, 1955. Its grantor traces its title to a patent by the United States dated November 5, 1910 issued to Santa Fe Pacific Railroad Company.

A United States Geological Survey map of this area dated 1902-1903 shows that at that time the river's east bank was approximately one-quarter of a mile west of Section 3. No evidence was produced as to the course of the river thereafter until 1938, but there seems to be general agreement that during this period the river moved steadily eastward. By April 24, 1938 the river's channel covered all of the east half of Section 3 except a small portion of the southeast corner.

In the year 1938, the flow of the river was brought under control by the construction of the Hoover Dam, and thereafter water was released only in such quantities as was suitable for downstream irrigation.

This discharge of water apparently has not been sufficient to cause any significant erosion or reliction in the river. By a map of the United States Geological Survey, Department of Interior, (the Davis Dam Quadrangle) dated 1950, the river is shown as being nearly three-fourths of a mile wide, flowing in part over the west half of Section 3. In 1959 and 1960 the river was dredged by the United States Department of Interior and the water which had theretofore spread over almost the entire width of the river's bed was confined to the dredged portion, principally within the west half of Section 4 and only partially within the east half of Section 3. That part of the former channel on the east half of Section 3, over which water no longer flows, is the subject matter of this controversy. The plaintiff, Bonelli, is claiming the exposed portion of the bed of the river.

Ordinarily in the United States the bed of a non-navigable river or stream is

owned by the riparian owners. Where the stream forms the boundary between owners, each owns on his side to the middle thread. However, the rule is not always applied to navigable rivers. By congressional enactment, the State of Arizona owns title to the beds of all navigable streams within its border, 67 U. S. Stat. 30, 43 U.S.C. §1311; Kansas v. Colorado, 206 U.S. 46, 51 L. Ed. 956, 27 S.Ct. 655. Since the Colorado River is not wholly within Arizona's borders, but is, itself, the border, Arizona's title extends from the center of the channel eastward to the river's high water line. Arizona v. California, 283 U.S. 423, 75 L. Ed. 1154, 51 S.Ct. 522; and see Mumford v. Wardwell, 73 U.S. 423, 18 L. Ed. 756; Pollard v. Hagan, 44 U.S. 212, 11 L. Ed. 565; Morgan v. Colorado Indian Tribe, 103 Ariz. 425, 443 P. 2d 421. As an aside, it may be observed that the boundary between Arizona and Nevada is not the channel's

thread. The boundary has been fixed by agreement between the two states.

It is common knowledge that rivers move sometimes so slowly as to be imperceptible during the lifetime of any single individual, and sometimes so rapidly by floods that the river's banks visibly disintegrate. Where the change is sudden and rapid, the change is said to be by avulsion. U. S. v. Claridge et al., U. S. District Court, Phoenix, Civ. 5080; Hirt v. Entus, 37 Wash. 2d 418, 224 P. 2d 620. Erosion, on the other hand, is the eating away of the soil by the river's current, and is a gradual, imperceptible process. Where the river moves by erosion, the boundary moves with the stream, but where the river moves by avulsion, the boundary remains in the center of the old channel, Nebraska v. Iowa, 143 U.S. 359, 36 L. Ed. 186, 12 S. Ct. 396; State v. Jacobs, 93 Ariz. 336, 380 P. 2d 998.

From the statement of facts and the

exhibits introduced in the instant case, we are unable to say whether the eastward movement of the Colorado River between 1903 and 1938 was by avulsion or erosion. It is to be recognized that avulsive changes are generally events so momentous that evidence is available to establish them. In the instant case, the failure to produce such evidence is an indication that the changes in the watercourse were imperceptible. The rule of law is that in the absence of clear evidence to the contrary, the movement of the river will be presumed to be by erosion, Arnd v. Harrington, 227 Iowa 43, 287 N.W. 292; Kitteridge v. Ritter, 172 Iowa 55, 151 N. W. 1097.

It follows from what has been said that as the river moved eastward across Section 3, the thread of its channel moved with it and the title of the State of Arizona to the east one-half of the river bed also shifted correspondingly, -- the east high water line of the river finally becoming the plain-

tiff's west boundary. As the river moved eastward, engulfing most of Section 3 in the channel of the river, the land to which plaintiff held title decreased so that, by 1938, the owners of the east one-half of Section 3 had, by the operation of natural forces, lost most of it to Arizona.

It is Bonelli's position that when the United States Government dredged the river in 1959, confining the waters thereof to a portion of the river's bed so as to prevent unreasonable loss of water by absorption and evaporation, the portion of the bed which was not used for the flow of water reverted to the previous owners. But we do not think so.

A stream is a watercourse having banks and channel through which waters flow, at least periodically. Southern Pacific Co. v. Proebstel, 61 Ariz. 412, 150 P. 2d 81. As has been said:

"A watercourse does not lose its character as such by reason of the fact that it is

> improved by deepening or is artificially controlled, nor because it is used as a conduit to carry other waters. Again, the character of a watercourse is not changed by the fact that a pond is created by a dam. Nor does a watercourse lose its character as such because all the water has been diverted therefrom, no matter for how long a period * * * nor by reason of the fact that the water has all been dammed at a place far up the stream.* * * * " (Emphasis in original.) Smith v. City of Los Angeles, 66 Cal. App. 2d 562, 153 P. 2d 69.

Obviously, a river does not have to flow continuously across the whole of its bed to the high water mark in order to avoid a claim by abutting owners to a part of the river's bed. The channel of a river is the bed of the stream over which its waters run, Benjamin V. Manistee River Imp. Co., 42 Mich. 628, 4 N.W. 483, and the bed of a river is the space contained between its banks, Pulley v. Municipality No. 2, 18 La. 278. Arizona does not lose title to the bed of the river to high water mark simply because the river has been dammed and its water channelized to a part of the bed.

The plaintiff argues what it calls the "artificial accretion" theory, urging

that an abutting owner is entitled to the accretion caused by artificial conditions over which he has no control. An accretion is a "gradual and imperceptible accumulation of land by natural causes," Black's Law Dictionary. In the instant case, the exposed portion of the channel was not brought into existence gradually or imperceptibly. The exposure was man-made and the channel was uncovered rapidly and perceptibly.

The plaintiff also argues what it calls the "re-emergence" theory. This occurs where a river which formerly eroded an abutting owner's land recedes so that the eroded land reappears -- a process known as reliction. Reliction is an increase of land by a permanent withdrawal or retrogression of a river. We believe, however, that the dredging of the river is an engineering relocation of the waters of the river by artificial means and is not a true case of with-

that an abutting owner is entitled to the accretion caused by artificial conditions over which he has no control. An accretion is a "gradual and imperceptible accumulation of land by natural causes," Black's Law Dictionary. In the instant case, the exposed portion of the channel was not brought into existence gradually or imperceptibly. The exposure was man-made and the channel was uncovered rapidly and perceptibly.

The plaintiff also argues what it calls the "re-emergence" theory. This occurs where a river which formerly eroded abutting owner's land recedes so that the eroded land reappears -- a process known as reliction. Reliction is an increase of land by a permanent withdrawal or retrogression of a river. We believe, however, that the creation of the waters of the flood-by artificial means and is not a true case of with-

drawal or retrogression.

We are not unaware that there are jurisdictions which have held that the land to the low water mark of a river or lake belongs to the abutting owners, see e. g., State Engineer v. Cowles Brothers, ___ Nev. ___, 478 P. 2d 159. We think, however, the better rule is that the courts have no authority to give away the title to land which clearly belongs to the state. Where, as here, the abutting owner's title extends only to the high water mark, and the beds and banks belong to the state, we can find no solid legal reason for concluding that the land below the high water mark to the water's edge belongs to the abutting owners.

Where a river shifts to a new location as a result of unnatural forces, the state does not lose title to the bed of the stream in the old location. People v. Shasta Pipe and Supply Co., 70 Cal. Rptr. 618; Padgett v. Central and Southern Florida Flood

Control District (Fla.), 178 So. 2d 900; State v. Aucoin, 206 La. 786, 20 So. 2d 136; Ray v. State (Tex.), 153 S.W. 2d 660; Wilemon v. City and County of Dallas Levee Imp. Dist., (Tex.), 264 S.W. 2d 543 (cert den. 348 U.S. 829).

The judgment of the Superior Court is reversed with directions to enter judgment quieting title in the State of Arizona from the Nevada boundary to the high water mark.

HAYS, V. C. J., ROBERT O. ROYLSTON, P. J., Superior Court Pima County, WARREN L. McCARTHY, J., Superior Court Maricopa County, concur.

NOTE: Justices JESSE A. UDALL and JAMES DUKE CAMERON having announced their disqualification to sit in the determination of this matter, the Honorable ROBERT O. ROYLSTON and Honorable WARREN L. McCARTHY were called to sit in their stead.

LOCKWOOD, Justice (Dissenting):

I cannot concur with the result at which Chief Justice Struckmeyer arrives in this case.

Chief Justice Struckmeyer has amply set forth the facts in the case, and his discussion of rights of a riparian proprietor in land under the common law is an excellent dissertation up to a point.

It must be borne in mind, of course, that the question here involves not the right to the use of the water of a river or stream, but involves the title to land bordering on, or beneath such river or stream. In the case of use of the water, the common law riparian right of owners of land bordering the river or stream was abrogated and the doctrine of prior appropriation established by the First Territorial Legislature in 1864 and has obtained by statute and Arizona Constitution ever since. But there are other "riparian rights" belonging to owners of land bordering rivers or streams unaffected by the Constitu-

tion and statutes regarding use of such waters by appropriation. There is no inconsistency in our constitutional and statutory provisions repudiating the doctrine of riparian rights and establishing the doctrine of prior appropriation (so far as the waters named by the legislative acts are concerned) and in the application of riparian rights in land owners to increase or decrease of land by accretion or reliction. See Water Conservation Dist.No. 1 v. Cotton Co., 39 Ariz. 65, 4 P. 2d 369; State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P. 2d 352.

As early as 1864 the Arizona Territorial Legislature first enunciated the policy of adoption of the common law as "the rule of decision" and as modified by subsequent legislative acts, that rule has obtained to the present. We must, however, examine to what extent the common law has become a fixed "rule of decision". An examination of succeeding legislative enactments is

therefore illuminating.

A.R.S. §1-201 presently reads as follows:

"The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decisions in all courts of this state." (Emphasis added.)

The Territorial Legislature in 1864 adopted §7 of Chapter 61, which reads as follows:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States, or the bill of rights or laws of this Territory, is hereby adopted, and shall be the rule of decision in all the courts of this Territory."

The same statutory provision was carried forward appearing as §3438 of the Compiled Statutes of 1877, as follows:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States, or the bill of rights or laws of this Territory, is hereby adopted, and shall be therule of decision in all

the courts of this Territory."

In 1887 the statutes were revised. The provision adopting the common law was significantly modified to read as follows:

> "The common law of England so far only as it is consistent with and adapted to the natural and physical condition of this territory, and the necessities of the people thereof, and not repugnant to, or inconsistent with the constitution of the United States, or bill of rights, or laws of this territory, or established customs of the people of this territory, is hereby adopted and shall be the rule of decision in all the courts of this territory." (Emphasis supplied.) R.S.A. 1887 §2935.

Thereafter a new code was enacted in 1901 by the Territorial Legislature. Therein all statute laws and titles of the Revised Statutes of 1887 were repealed (except a certain Title 3 regarding assignment for benefits of creditors, not here relevant.) In this revision no general adoption of the common law as "the rule of decision" was adopted. The only reference thereto was regarding evidence, reading:

> "The common law as now practiced and understood shall in its application to evi-

dence, be followed and practiced by the courts of this territory, so far as the same may not be inconsistent with this title or any other law." Section 2533, R.S.A. 1901.

However, the Territorial Legislature of 1907 on March 5th adopted Chapter 10, which was entitled "To Revive Chapter Five of Title LX of the Revised Statutes of 1887." In Chapter 10, §8, the Legislature reenacted in practically identical wording former §2935 of the Revised Statutes of 1887, reading as follows:

> "The Common Law, so far only as it is consistent with, and adapted to the natural and physical condition of this Territory, and the necessities of the people thereof, and not repugnant to, or inconsistent with the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all courts of this Territory." Session Laws of the 24th Legislative Assembly of the Territory of Arizona of 1907, Chapter 10, §8, p. 11 (Emphasis supplied.)

In the first State Code adopted in 1913, §5555 is practically identical to the 1907 provision. The same statute was carried forward in the 1928 Code as §3043, and there-

dence, be followed and practiced by the courts of this territory, so far as the same may not be inconsistent with this title or any other law." Section 2933, R.S.A. 1901.

However, the Territorial Legisla-

ture of 1907 on March 5th adopted Chapter 10, which was entitled "To Revive Chapter Five of Title LX of the Revised Statutes of 1887." In Chapter 10, §8, the legislature reenacted in practically identical wording former §2933 of the Revised Statutes of 1887 reading as follows:

"The Common Law, so far only as it is consistent with, and suited to the natural and physical condition of this Territory, and the principles of the people thereof, and not repugnant to, or inconsistent with the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all courts of this Territory." Session Laws of the 28th Legislative Assembly of the Territory of Arizona of 1907, Chapter 10, §8, p. 11. (Emphasis supplied.)

In the first State Code adopted in 1913, §5555 is practically identical to the 1907 provision. The same statute was carried forward in the 1928 Code as §3043, and there

after it was carried forward without change to the present §1-201, A.R.S. 1956, still in effect.

The First Territorial Legislature, in 1864 had responded to the urging of Governor Goodwin that they "adopt a permanent policy as to the use of water for agriculture as well as mining purposes." The Legislature adopted Article 22 of the Bill of Rights, reading as follows:

> "All streams, lakes, and ponds of water capable of being used for the purposes of navigation or irrigation, are hereby declared to be public property; and no individual or corporation shall have the right to appropriate them exclusively to their own private use except under such equitable regulations and restrictions as the Legislature shall provide for that purpose."

Immediately thereafter the language, supra, of Chapter 55 of the Howell Code was enacted, which also established the policy of appropriation as opposed to riparian rights in waters of rivers, creeks and streams of running water in the Territory of Arizona. Thereafter, in the case of Boquillas Land

after it was carried forward without change to the present §§ 2-201, A.R.S. 1956, still in effect.

The First Territorial Legislature, in 1864 harkened to the urging of Governor Goodwin that they "adopt a permanent policy as to the use of water for agriculture as well as mining purposes." The Legislature adopted Article 22 of the Bill of Rights, reading as follows:

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Immediately thereafter the language, supra, of Chapter 53 of the Howell Code was enacted which also established the policy of appropriation as opposed to riparian rights in waters of rivers, creeks and streams of running water in the Territory of Arizona.

Therefore, in the case of Bopullins Land

and Cattle Co. v. St. David Coop. Assn., 11 Ariz. 128, 89 Pac. 504 (filed March 22,1907) affirmed 213 U.S. 339, 29 S. Ct. 493, 53 L. Ed. 822 (1909), the right of the state to abrogate the common law rules of riparian rights to the use of water, and to establish the right of appropriation of water was upheld. The Court discussed the development of the custom of using irrigation water by right of appropriation without regard to the riparian character of the lands being in force by virtue of Mexican Law before the acquisition of the State of Arizona under the Treaty of Guadalupe Hidalgo and the Gadsden Purchase. The Court stated: "Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law, as modified by custom." 11 Ariz. at 139, 89 Pac. at 508.

In a concurring opinion outstanding for its brevity and clarity, Territorial Supreme Court Judge Nave commented on the com-

mon law as follows:

"The essence of the common law is flexibility and adaptability. It is not a body of fixed rules, but is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life, as, from time to time, they are brought before tribunals. Hence, though the common law is homogeneous, yet it finds widely different expression in different jurisdictions. Should the common law become so crystalized that its expressions must take the same form, wherever the common law system prevails, irrespective of physical, social, or other conditions peculiar to the locality, it would cease to be the common law of history, and would be but an inelastic and arbitrary code. The common law historically has carried with it, and as part of it, the principle that precedents -- earlier deductions from known conditions -- must yield to the reason of different or modified conditions. This is expressed, and analogously applied in People v. Appraisers, 33 N. Y. 461, where it is said: 'No doctrine is better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes, not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails.'" 11 Ariz. at 140, 89 Pac. at 508.

And in Maricopa County Municipal

Water Conserv. Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P. 2d 369, the Court paraphrased the language of Judge Nave and stated:

"It is true that the common law is not in its nature and character an absolute, fixed, and inflexible system; it is rather a system of general juridical truths, founded on reason, natural justice, and enlightened public policy, which are conditionally explained with the progress of society, and which adapt themselves to the gradual changes of that society and the conditions, exigencies, and usages of the country. It is never entirely stationary, but is modified and extended by analogous construction and custom so as to embrace new relations springing up from time to time from an amelioration or change of society, or different physical conditions arising in the countries to which it is to be applied. Should it ever become so crystallized that its expressions must take the same form, irrespective of physical, social or other conditions, peculiar to the locality or the character and habits of the people, it would cease to be the common law, and become a rigid and arbitrary code. And we think, as suggested by the Supreme Court of the United States in Boquillas etc. Co. v. St. David etc. Assn., supra, the doctrine of liberal interpretation set forth in paragraph 2935, supra, was equally implied in the Howell Code. But no judicial interpretation of the common law can ever prevail against an explicit declaration of public policy made by the legislature when acting within its jurisdiction. This declaration we have seen was made in the Bill of Rights and

Water Conserv. Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P. 2d 369, the Court paraphrased the language of Judge Haws and stated:

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the Howell Code, and it has never been changed in substance up to the present." 39 Ariz. at 81, 82, 4 P. 2d at 375.

The question here involved is one of first impression, and one on which our Legislature has never spoken through its statutory powers. But I believe in view of the importance of the agricultural developments bordering the Colorado River, and our constitutional policy prohibiting a taking of private property without just compensation, our decision should not be based on a construction of common law out of harmony with the conditions and usages of a burgeoning agricultural industry which flourishes most effectively by its use of land bordering the Colorado River.

It is well established that upon the formation of each new state in the Union, it became the owner of the navigable rivers therein together with the land underlying such waters. Under Joint Resolution No. 8 (21 August 1911) 37 U. S. Stat. 39, Congress

authorized the admission of Arizona with other States of the Union upon an "equal footing". Therefore the State of Arizona acquired sovereignty over the navigable rivers within its borders, together with the land underlying the same. The Colorado River, at the location in question here, is a navigable river by adjudication. Arizona v. California, 283 U. S. 423, 75 L. Ed. 1154, 51 S. Ct. 522. No new rights were conferred by Congress in 67 U. S. Stat. 29, 43 U. S. C. §1301, such statute merely confirming as a "quit-claim" all previous rights in navigable rivers. People v. Hector, 179 Cal. App. 2d 823, 4 Cal. Rptr, 334 (1960). Since the Colorado River formed the boundary between Arizona and the states of California and Nevada, the sovereignty of Arizona extended only to the middle of the stream of the Colorado River on such boundary, and eastward to the river's high water line, at the time Arizona became a state. Owners of

land abutting the river owned only to the high water mark, under the common law. As to their rights upon a change in the river's banks, the common law rule with regard to accretion and reliction was not necessarily in conflict with Arizona law. The nature of the title to the riverbed so acquired, however, is another matter. As stated in State v. R. E. Janes Gravel Co., 175 S. W. 2d 739 (Tex. Civ. App. 1943; reversed on other grounds in Manfrais v. State, 142 Tex. 559, 180 S. W. 2d 144 (1944), "the title to a riparian owner is 'a base fee, determinable upon the occupancy of his soil by the river,' and that the title of the State to the riverbed is likewise a 'base or qualified' fee, 'determinable in favor of the riparians upon the abandonment of the bed by the river.'" 175 S. W. 2d at 741.

This holding is entirely consistent with the provision in our Constitution that no private property should be taken or dam-

aged for public or private use without just compensation having been first made. Article 2, §17, Arizona Constitution. The state properly has a governmental interest in the control of the navigable river, and therefore in the land beneath it, so long as the river covers the land of a riparian proprietor. However, it is when the river is withdrawn from land originally owned by the riparian proprietor that governmental interest ceases to exist. It is more consistent with Article 2, §17 of our Constitution that the riparian proprietor's property right, hitherto subjected to the qualified fee of the state by the accretive movement of the river, should be completely restored to him; otherwise there is a taking by the state of private property for public use without just compensation. To permit the state to retain title to the property under such circumstances would controvert the provision of the Constitution.

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To hold, as I believe we should, that the state's qualified title is terminated, and the riparian proprietor's title is released from its subservience, is in harmony with and is not repugnant to or inconsistent with the provisions of Article 2, §17, supra, or of A. R. S. §1-201.

Supporting this conclusion, Michigan has held that riparian land rights are property for the taking or destruction of which by the state compensation must be made. Klais v. Danowski, 373 Mich. 262, 129 N. W. 2d 414 (1964):

"The question is raised whether the patentees and those claiming under them have lost from the then dry lands originally patented to them title to so much of the private claims as, subsequent to the date of patent, may have become inundated by rising lake levels or through the processes of avulsion or erosion. That the answer should be held to be in the negative is supported by Mulry v. Norton, 100 N. Y. 424, 3 N. E. 581, In re City of New York, 256 N. Y. 217, 176 N. E. 171, In re City of New York v. Realty Associates, 256 N. Y. 222, 176 N. E. 173, and City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849. The owner's continuing title and ownership, after the lands became submerged and, thereafter, when their restora-

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Supporting this conclusion, Montana has held that riparian land rights are property for the taking or destruction of which by the state compensation must be made. Kiva v. Dunsweil, 373 Mont. 262, 189 N. W. 24 413 (1964):

"The question is raised whether the patentees and those claiming under them have lost from the time dry land origin-ally patented to them title to so much of the private claims as, subsequent to the date of patent, may have become inundated by rising lake levels or through the processes of avulsion or erosion. That the answer should be held to be in the negative is supported by Muley v. Morton, 100 N. Y. 424, 3 N. E. 281, In re City of New York, 256 N. Y. 219, 176 N. E. 377, In re City of New York v. Realty Associates, 256 N. Y. 222, 176 N. E. 379, and City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849. The owner's continuing title and ownership, after the lands became submerged and, thereafter, when their restora-

tion to dry condition results either from natural forces or even by artificial, man-made means, is indicated by these cases. We hold to that same effect." 373 Mich. at 276-277, 129 N. W. 2d at 421 (Emphasis supplied.)

Likewise the State of California has held that all of its navigable waterways and the lands lying beneath them are held by the state "as trustee of a public trust for the benefit of the people". Colberg, Inc. v. State, 67 Cal. 2d 408, 62 Cal. Rptr 401, 432 P. 2d 3 (1967), cert. den. 390 U. S. 949 (1968) citing People v. Gold Run D. & M. Co., 66 Cal. 138, 151, 4 Pac. 1152 (1884); Martin v. Wadel, 41 U. S. (16 Pet.) 367, 10 L. Ed. 997 (1842); Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); Miramar Company v. City of Santa Barbara, 23 Cal. 2d 170, 143 P. 2d 1 (1943). The law with regard to the sovereignty of California over navigable streams was early declared in the case of Eldridge v. Cowell, 4 Cal. 80 (1854), in the following language:

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complete sovereignty over her navigable bays and rivers, and although her ownership is, by the law of nations, and the common and civil law, attributed to her for the purpose of preserving the public easement, or right of navigation, there is nothing to prevent the exercise of her power in certain cases to destroy the easement, in order to subserve the general good, which, when done, subjects the land to private proprietorship." 4 Cal. at 87.

In Colbert, Inc. v. State, supra, the Supreme Court of California stated as follows:

"As we have shown above, the power of the State of California to deal with its navigable waters, though subject to the superior federal power, is considerably wider in scope than that paramount power. The state, as owner of its navigable waterways subject to a trust for the benefit of the people, may act relative to those waterways in any manner consistent with the improvement of commercial traffic and intercourse. We are of the further view that the law of California burdens property riparian or litoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters, and that 'when the act (of the state) is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience.' (Gray v. Reclamation District No. 1500, supra, 174 Cal. 622, 636, 163 P. 1024, 1030.)" (Emphasis supplied.)

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The State of Texas departs somewhat from the English Common Law as to rights of riparian proprietors in land abutting on navigable rivers when the river has abandoned its course through either avulsive or accretive processes. When the Republic of Texas was formed, by treaty with Mexico, it agreed to protect existing property rights of owners under various Mexican land grants. Nevertheless in 1840 the Republic of Texas adopted the Common Law as the rule of decision with certain exceptions as to rights in certain Mexican land grants. In the landmark case of Manry v. Robinson, et al, 56 S. W. 2d 438, 122 Tex. 213 (1932), a most illuminating discussion of the development of rights of riparian owners in and to land, is found. The Court there traced the development of riparian land rights from their inception in Roman law (commonly referred to as the civil law) through the adaptations of the civil law by the various countries into

which it was carried by the Romans. These of course included England, France, Spain and Mexico, and our own country. The Laws of England with reference to rivers was founded upon the Roman Law but with adaptations to meet the conditions existing in England. Similarly, France, Spain, Mexico and the various states in the United States adopted interpretations best adapted to their physical conditions and customs.

The development of the law with regard to rights of riparian proprietors in the States of California and Texas were strongly influenced by the fact that the title to much of the land derived from Mexican land grants. Some of the land within the boundaries of the now State of Arizona, also derived title from Mexican land grants. Likewise, having been a part of Mexico, Arizona was subject to many of the same customs which arose out of Mexican law, which in general followed the civil law. Boquillas,

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supra.

With regard to the development of laws with reference to rivers, from Roman Civil Law through the English Common Law, and its various adaptations in our Southwest, we quote from the historical account given in Manry, supra:

"There can be no doubt but that the laws of England with reference to rivers were founded upon the Roman law. Authorities supra and post; Hardin v. Jordan, 140 U. S. 371, 390, 11 S. Ct. 808, 35 L. Ed. 428. The two systems of law were similar in many respects, but differed in some material particulars. Under the civil law, all perennial streams were public, while under the common law navigable streams within tidewater limits only, in the absence of prescription, dedication, or act of Parliament, were public. Authorities supra; Gould on Waters (3d Ed.) §§51, 52, 53; Coulson & Forbes on Waters (4th Ed.) pp. 77, 78, 449, 450; Halsbury's Laws of England, vol. 25 p. 398, §760; Hardin v. Jordan, 140 U. S. 371, 383, 11 S. Ct. 808, 35 L. Ed. 428.

"There is a difference of opinion among writers on the Roman law as to whether or not the beds of public streams under that system of jurisprudence belonged to the sovereign or to the owners of adjacent land.

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Mr. Farnham (vol. 1, §49), and others, that the title of the riparians extended to the center of the streams, because that construction was suitable to her conditions; while France, Spain, and Mexico adopted that interpretation indicated by Gaius (Scott's Civil Law, vol 9. p. 107), and followed generally by the American courts (Farnham, vol. 1, §49), that title to the beds of all navigable streams, so long as occupied, was in the public or the sovereign, because that construction was suitable to their conditions.

"Each of the nations named in selecting its interpretation of the Roman law as to the ownership of stream beds, so long as occupied chose that rule which was best suited to its conditions. The jurisprudence of all the nations mentioned, France, Spain, Mexico, Texas (down to 1840), and England (as to nontidal streams), however, agree with the Roman law, that when a river abandons its bed and selects a new channel, the abandoned bed becomes the property of the adjacent land owners. Authorities supra; Farmham on Waters, vol. 1, §49." 56 S. W. 2d at 446, 122 Tex. at 230-231. (Emphasis supplied.)

* * * * * * *

"Under the English common law the sovereign owned only those portions of river beds which were within tidewater limits. River calls extended to the medial line of boundary streams above tidewater, whether navigable or not, and the beds were the property of the riparians. Hardin v. Jordan, 140 U. S. 371, 383,388, 11 S. Ct. 808, 35 L. Ed. 428; Shively v. Bowlby, 152 U. S. 1, 11, 14 S. Ct. 548, 38 L. Ed. 331; 4 Ruling Case Law, p. 82,

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¶¶12, 13; p. 83, ¶15; 9 Corpus Juris, p. 184, ¶60, p. 185, ¶61; Farnham on Water Rights, vol. 1, ¶48, vol. 2 ¶¶ 413, 415; Kinkead v. Turgeon, 74 Neb. 573, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 121 Am. St. Rep. 740, 13 Ann. Cas. 43; 27 Ruling Case Law, p. 1358, ¶¶268, 272; 9 Corpus Juris, p. 184, ¶59; p. 185, ¶¶61, 63; Packer v. Bird, 137 U. S. 661, 666, 11 S. Ct. 210, 34 L. Ed. 819; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Kent's Commentaries (13th Ed.) vol. 3, pp. 592, 593; Coulson & Forbes Law of Waters (In England), pp. 91, 77; Halsbury's Laws of England, vol. 28, ¶¶744, 756, 757.

"The beds of navigable streams above tidewater were parts of the coterminous estates, but so long as occupied by navigable waters the ownership and control by the owners was limited by the public right of navigation, predicated upon custom, dedication, or act of Parliament, but not upon original ownership and control by the sovereign, nor upon the common law. Halsbury's Laws of England, vol. 28, p. 406, ¶784; p. 398, ¶¶ 760, 761, 762; p. 396, ¶756; Coulson & Forbes on Waters (4th Ed.) p. 450; Hale's De Jure Maris as published in Moore's History and Laws of the Foreshore, etc. (3d Ed.) p. 370 et seq.; Farnham on Waters, vol. 1, ¶48; Kinkead v. Turgeon, 74 Neb. 573, 104 N. W. 1061, 109, N. W. 744, 1 L. R. A. (N. S.)762, 7 L. R. A. (N. S.) 316, 121 Am. St. Rep. 740, 743, 13 Ann Cas. 43." Id., 56 S. W. 2d at 445-446, 122 Tex. at 229. (Emphasis in original.)

* * * * * * * *

"These illustrations suffice to show that as to the law of streams we have only

adopted such rules of the common law as are suitable to our conditions and as are in harmony with the basic principles of our jurisprudence with reference to the law of waters.

"We will now examine the question as to whether or not we have adopted the claimed common law rule that the beds of all navigable streams upon abandonment are the property of the state.

"No such rule ever existed under the common law of England. There are respectable authorities for the statement that the beds of navigable streams within tidewater limits upon abandonment remain the property of the Crown; but this is because the rivers and their beds where the tide ebbs and flows are arms of the sea and not because of navigability alone. Authorities supra; Bacon's Abridgment, vol. 8, pp. 14, 19; Farnham on Waters, vol. 1, §38; Hale's De Jure Maris in Moore's History of the Foreshore, etc. (3d Ed.) pp. 378 to 380; Mayor of Carlisle v. Graham, L. R. Ex., vol. 4, p. 360.

"The rule of the common law as to rivers above tidewater, which are, as Bacon's Abridgment says, 'no original part or appendix of the sea,' was, and is that the adjacent lands extend to the medial line, burdened with certain easements incident to navigation, if navigable, and that upon abandonment of the beds in full title pass to the riparian owners. Authorities supra; Bacon's Abridgment, vol. 8, p. 14; Farnham on Waters, vol. 1, §48; Hale's De Jure Maris in Moore's History of the Foreshore, etc. (3d Ed.) pp. 370 to 373; Kinkead v. Turgeon, 74 Neb. 573, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 121 Am. St.

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"In our opinion, in adopting the common law, we adopted the last-named rule, since the rule to the extent that it assigned the beds of nontidal navigable streams upon abandonment to the riparians was consistent with our then established system of jurisprudence, and better suited to our conditions than the other rule of the common law stated above. Id., 56 S. W. 2d at 447-448, 122 Tex. at 233 (Emphasis in original.)

The United States government through its Bureau of Reclamation, without permission or consent from or by plaintiff or any express consent by the State (although there is an indication that the State approved the rechanneling project), changed the channel of the Colorado River by relocating and rechanneling it in the latter part of 1959 and the early part of 1960. This caused an abandonment by the river of a large portion of Section 3 which was originally owned, by virtue of United States patent, by those from whom plaintiff derived title. Under the customs established in Arizona Territory, by re-

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The United States Government through its Bureau of Reclamation, without permission or consent from or by plaintiff or any express consent by the State (although there is an indication that the State approved the reclaiming project), changed the channel of the Colorado River by relocating and reclaiming it in the latter part of 1939 and the early part of 1940. This caused an abandonment by the river of a large portion of Section 3 which was originally owned, by virtue of United States patent, by those from whom plaintiff derived title. Under the customs established in Arizona Territory, by re-

ference to Mexican law, the plaintiff would thereby have regained his land, bounded by the high water mark of the rechanneled river. Otherwise, the state, no longer having a governmental capacity over land formerly existing by virtue of its being beneath a navigable river, would be in effect taking property of plaintiff without compensation.

I would, for the foregoing reasons, affirm the judgment of the trial court quieting title in the plaintiff to the land in question.

LORNA E. LOCKWOOD, Justice

ference to Mexican law, the plaintiff would thereby have retained his land, bounded by the high water mark of the reclaimed river. Otherwise, the state, no longer having a governmental capacity over land formerly existing by virtue of its being beneath a navigable river, would be in effect taking property of plaintiff without compensation.

I would, for the foregoing reasons, affirm the judgment of the trial court quieting title in the plaintiff to the land in question.

JOSEPH E. LOCKWOOD, Justice

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

In Banc

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Appellants,

v.

BONELLI CATTLE COMPANY, a California corporation,

Appellee.

No. 10030-PR

(April 13, 1972)

Appeal from the Superior Court of Mohave County

Honorable T. J. Mahoney, Judge

SUPPLEMENTAL OPINION

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The Attorney General

by Dale R. Shumway — Phoenix
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Attorneys for Appellants

Elmer C. Coker — Phoenix

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Attorney for Appellee

Snell & Wilmer — Phoenix
by Maynard P. Goudy, Esq.

Fennemore, Craig, von Ammon & Udall — Phoenix
by John J. O'Connor, III, Esq.

Streich, Lang, Weeks, Cardon & French — Phoenix
by Dan M. Durrant, Esq.

Evans, Kitchel & Jenckes, P. C. — Phoenix
by Burton M. Apker, Esq.

Bilby, Thompson, Shoenhair & Warnock, P. C. — Tucson
by W. E. Dolph, Esq.

Robertson, Molloy, Fickett & Jones, P. C. — Tucson
by Russell E. Jones, Esq.

Westover, Keddie & Choules — Yuma
by G. Thomas Choules, Esq.

Amici Curiae

STRUCKMEYER, Justice

Appellee Bonelli and others who have appeared as amici curiae have principally advanced economic reasons for rehearing our decision in State v. Bonelli Cattle Company, 107 Ariz. 465, 489 P.2d 699 (1971). Such are more properly matters of legislative consideration than the concern of a court

Shell & Milner Phoenix
by Maynard P. Gourly, Esq.

Farnsworth, Craig, von Ammon &
Udall Phoenix
by John J. O'Connor, III, Esq.

Stretton, Lane, Weeks,
Clayton & Pierson Phoenix
by Dan M. Durrant, Esq.

Evans, Kitchel & Jenckes, P. C. Phoenix
by Burton M. Apker, Esq.

Bilby, Thompson, Shoemaker & Tucson
Warnock, P. C.
by W. E. Dolph, Esq.

Robertson, Molloy, Blakett & Tucson
Jones, P. C.
by Russell E. Jones, Esq.

Westover, Keddie & Choules Yuma
by O. Thomas Choules, Esq.

Amici Curiae

STRUCKMEYER, Justice

Appellee Bonsall and others who have appeared as amici curiae have petitioned for rehearing our decision in State v. Bonsall Cattle Company, 107 Ariz. 465, 489 P.2d 839 (1971). Such are more property matters of legislative consideration than the concern of a court

whose responsibility is to adhere to the law as it finds it so that rights will not depend on the personal idiosyncracies of its members or hang in suspense when economic considerations change.

We are concerned, however, with one possible area of misunderstanding. In our decision, we used the words "high water line" and "high water mark." In particular, we directed the court below to quiet title in Arizona from the Nevada line to the high water mark. The parties question the meaning of our use of the words "high water mark."

The title to all lands within the beds of navigable waters including all reclaimed lands which formerly were beneath navigable waters up to the ordinary high water mark was quit claimed in 1953 to the states by the Submerged Lands Act of Congress, 67 Stat. 29, 43 U.S.C.A. § 1301 et seq. The Act specifically included lands "heretofore

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Act specifically included lands "heretofore

or hereafter modified by accretion, erosion and reliction." Beyond argument, title to and ownership of the lands beneath the Colorado River is in the State of Arizona from the Nevada boundary up to the ordinary high water mark in the natural channel as it existed prior to the taming of the river in 1938 by the completion of the Hoover Dam and the subsequent lowering of the channel by dredging.

Congress, of course, could not constitutionally diminish the property rights of the states to the beds of navigable rivers as settled by over 100 years of decisions of the Supreme Court of the United States commencing with Pollard v. Hagan, 3 How. 212, in 1845. Most certainly, the United States government could not claim additional rights in the bed of a navigable river by the construction of dams and artificial channels. Nor do we find such an intent.

In considering Congress' language,

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In determining Congress' language,

we take it that the word "ordinary" is used in its customary sense, meaning "not uncommon or exceptional," Webster's Third International Dictionary. This is confirmed by an examination of the opinions in Pollard v. Hagan, supra, and Goodtitle v. Kibbe, 9 How. 471.

In Pollard v. Hagan, the trial court in Alabama charged the jury that if it believed the premises sued for were below the "usual high water mark" at the time Alabama was admitted to the Union, then the plaintiffs acquired no title through patents of the United States government "whether the waters had receded by the labor of man only, or by alluvion." (Emphasis supplied.) The Supreme Court of Alabama affirmed the judgment entered on the jury's verdict and its judgment, in turn, was affirmed by the Supreme Court of the United States. In Goodtitle v. Kibbe, supra, the Supreme Court of the United States reconsidered the issues decided in Pollard v. Hagan and reaffirmed

its previous decision. There, the trial court instructed the jury that if plaintiff's land was below "ordinary high water mark" at the time Alabama was admitted to the Union, the confirming Act of Congress and the patent from the United States government conveyed no title. (Emphasis supplied.)

It is in the sense of the usual and ordinary that the words "high water line" and "high water mark" where used in our decision are to be understood.

It should be made clear that Arizona's title as against private persons is in no way controlled by the opinion in United States v. Claridge, 279 F.Supp. 87, aff'd 416 F.2d 933. The patent through which Bonelli Cattle Company claims title was issued by the United States November 5, 1910. The subsequent artificial control of the river could not deprive Arizona of property rights in the bed which were constitutionally vested prior to the completion of the Hoover

Dam in 1938 and the later rechannelization by dredging. The condition of the Colorado River at or immediately prior to its control by artificial works is the appropriate time for determining the rights of the parties, although, of course, evidence of the river's condition thereafter may be illuminating.

Since Arizona's title to the bed of the Colorado River is the mark to which the water formerly rose at the time of or in the seasons of ordinary high water, and since we deem it desirable that any possible controversy be avoided, we approve for the purpose of determining the bed and banks this particular language of Justice Curtis concurring in Howard v. Ingersoll, 13 How. 381, 427:

> "(T)he banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water."

Further, we approve the definition of "high water mark" as applied to a natural channel by the Supreme Court of Iowa in State v. Sorenson, 222 Iowa 1248, 271 N. W. 234:

> "An accepted definition of 'high-water mark' is set out in the case of City of Cedar Rapids v. Marshall, 199 Iowa, 1262, loc. cit. 1264, 203 N.W. 932, 933, where this court said: "The term 'ordinary high-water mark' has been frequently defined by this and many other courts. It is not the line reached by unusual floods, but it is the line to which high water ordinarily reaches. (Citing case.)" 'High Water mark' means what its language imports -- a water mark. It is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes.' * * * Bennett v. National Starch Mfg. Co., 103 Iowa, 207, 72 N.W. 507;* * * Houghton v. C., D. & M.R. Co., 47 Iowa, 370.
>
> The high-water mark, therefore, may be defined as to the line to which high water ordinarily reaches, and is not the line reached by the water in unusual floods. It is that line below which the soil is unfit for vegetation or agricultural purposes."

Our decision directing the Superior Court of Mohave County to enter

judgment quieting title in the State of Arizona from the Nevada boundary to the high water mark as supplemented by this decision is approved.

HAYS, C. J., ROBERT O. ROYLSTON, Judge, Superior Court, Pima County, and WARREN L. McCARTHY, Judge, Superior Court, Maricopa County, concur.

NOTE: Justice James Duke Cameron and Retired Justice Jesse A. Udall having announced their disqualification to sit in the determination of this matter, the Honorable Robert O. Roylston and Honorable Warren L. McCarthy were called to sit in their stead.

LOCKWOOD, Justice (Dissenting): I dissent from the holding in the foregoing supplemental opinion which reaffirms the original decision ordering the title to the property involved quieted in the State of Arizona.

The reasons for my dissent are

judgment quieting title in the State of
Idaho from the Nevada boundary to the high
water mark as supplemented by this decree
is approved.

MAYO, C. J., ROBERT C. ROYLSTON,
Judge, Superior Court, Elmo County, and
WARREN L. MCCARTHY, Judge, Superior Court,
Marlowe County, concur.

NOTE: Justice Jesse Dunn Cameron and Retired
Justice Jesse A. Udall having an-
nounced their disqualification to
in the determination of this matter
the Honorable Robert O. Moylston and
Honorable Warren L. McCarthy were
called to sit in their stead.

LOCKWOOD, Justice (Dissenting):

I dissent from the holding in the
foregoing Majority opinion which recog-
nizes the original decision awarding the
title to the property involved quieted in
the State of Idaho.

The reasons for my dissent are

fully set forth, as attached to the original opinion. They are basically two-fold:

(1) The majority of the court justifies its decision by application of common law principles of rights of riparian land owners. In my opinion the common law is inapplicable because the principles adopted are not, pursuant to the statutory provisions of A.R.S. § 1-201, "consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof." (2) The decision violates the provisions of Article 2, § 17, Arizona Constitution, in that the result, i. e., permitting the state to acquire without compensation large quantities of property from private owners, constitutes a taking of the land for public use without just compensation having been made therefor.

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erty from private owners, constitutes a
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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD M. CLARIDGE and
KAY T. CLARIDGE, his wife, et al.

and

STATE OF ARIZONA, EX REL.,
OBED M. LASSEN,

Defendants-Appellants.

No. 22312

(September 19, 1969)

On Appeal from the United States District Court for the District of Arizona

Before: MERRILL and ELY, Circuit Judges, and KILKENNY, District Judge*

Per Curiam:

This action was instituted by the United States to quiet title to lands located on the Arizona side of the Colorado

* Honorable John F. Kilkenny, United States District Judge for the District of Oregon, sitting by designation.

River in the Palo Verde Valley. Judgment of the District Court was rendered in favor of the United States. 279 F.Supp. 87 (D.Ariz. 1967). From that judgment the defendants and the State of Arizona, as intervenor, have appealed. They assert that the lands in question are not in the public domain but that title thereto passed to the State of Arizona upon its becoming a state in 1912. They contend that at that time the lands were in the bed of the Colorado River[1] and remained there until the construction of Hoover Dam in 1935 reduced the width of the river.

The facts are fully stated in the opinion of the District Court. For the purposes of this appeal it is sufficient to state that appellants' theory is founded on the mistaken assumption that the annual spring floods of the river (suffered prior to the advent of Hoover Dam), which covered the valley from bluff to bluff, constituted

its "ordinary high water" and that the valley, from bluff to bluff, thus constituted the bed of the river. By eliminating these floods, appellants contend, the Hoover Dam caused an avulsive change in the flow of the river so that the United States as riparian owner did not take title to the flood plain.

Appellants' definition of "ordinary high water mark" is unsound. The District Court concluded, and we agree:

> "The ordinary high water mark of a river is the natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain, nor is it confined to the lowest stages of the river flow." 279 F.Supp. at 91.

This is in accord with holdings of the Supreme Court. Oklahoma v. Texas, 260 U.S. 606, 635 (1923); Alabama v. Georgia, 64 U.S. (23 How.) 505, 515 (1859); Howard v. Ingersoll, 54 U S. (13 How.) 380, 415 (1851).

The District Court was therefore not in error in ruling that a precise loca-

tion of the high water mark at the time of Arizona's statehood was unnecessary. While the river unquestionably has meandered through the valley since that time, any change in its course has resulted from gradual erosion and not from avulsion, and the resulting accretion passes to the United States as riparian owner. Whether the Hoover Dam affected the course of the river is of no significance, for it did not result in avulsive changes and it was not constructed for the purpose of reducing riverbed holdings. 43 U.S.C. § 617. As this court stated in Beaver v. United States, 350 F.2d 4, 11 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966):

> "The erecting of artificial structures does not alter the application of the accretion doctrine * * * unless, perhaps, structures are erected for the specific purpose of causing the accretion."

For the reasons set forth in the opinion of the District Court, judgment is affirmed.

FOOTNOTES

1. (Page 1 of Decision, Page 2c this Appendix) Confirming prior case law, the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §1301(a)(1), in effect quitclaims to the states "* * * all lands * * * covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, * * * up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction * * *."

FOOTNOTES

1. [Page 1 of Resolution, Page 2a this
Appendix] Confirming prior case law, the
submerged lands Act of 1953, 67 Stat. 29
43 U.S.C. §1301(a)(1), in effect quitclai
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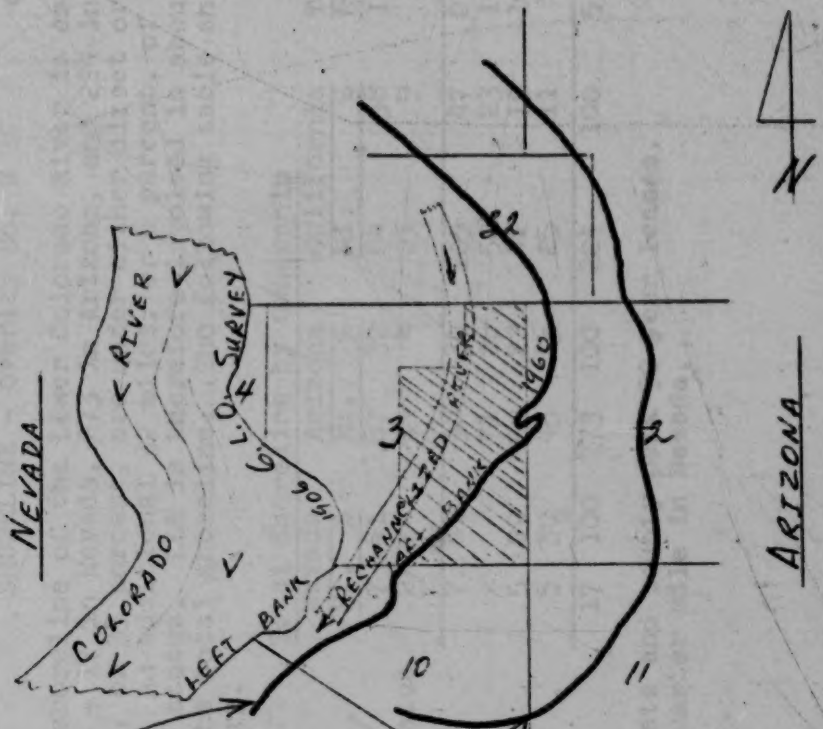
such State became a part of the Union,
* * * up to the ordinary high water mark
bordering on, or measured seaward by acc
tion, erosion, and reliction * * *."

APPENDIX D

The sketch on Page 2d of this APPENDIX D is a composite of the three sketches referred to by Judge Cameron in his decision of the Arizona Court of Appeals identified as Figures 2, 3 and 4, Pages 1000, 1001 and 1002, 464 P.2d, 11 Az. App. 412, et seq.

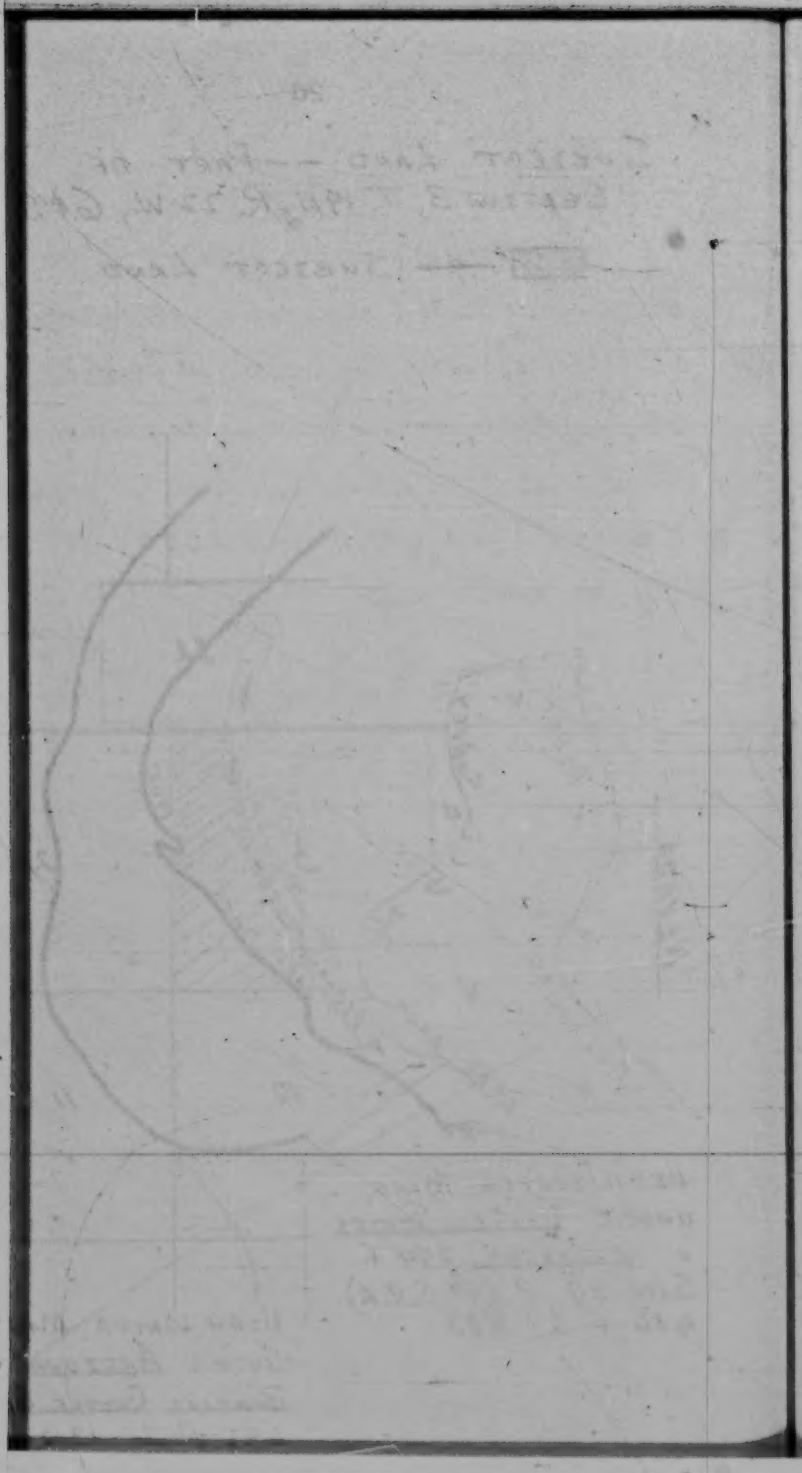
SUBJECT LAND -- PART OF
SECTION 3, T. 19N., R. 22 W., G&S. R.B.M.

▨ —— SUBJECT LAND



HIGH WATER MARK UNDER UNITED STATES V CLARIDGE, 274 F. SUPP. 87 & (9TH C.C.A.) 416 F. 2d 933

HIGH WATER MARK UNDER ARIZONA V. BONELLI CATTLE COMPANY, 495 P. 2d 1312



SHORELINE - Overlay No. 2

The total shoreline of the Lower Colorado River is estimated to be about 514 miles - 17 in Nevada, 273 in Arizona, and 224 in California. About 178 miles, or 35 percent, are under either direct or indirect BR-BLM management. An additional 32 miles, or 6 percent, of shoreline are in undetermined status. BLM is therefore involved in about 210 miles or 41 percent of the total shoreline. The following table shows shoreline by major category.

Total Shoreline by Ownership

	Nevada		Arizona		California		Total	
	Mi.	%	Mi.	%	Mi.	%	Mi.	%
Bur.Recl.-BLM 1/	7	41	87	32	84	38	178	35
Undetermined status	2/	-	11	4	21	9	32	6
Subtotal	7	41	98	36	105	47	210	41
BSF&W			71	26	52	23	123	24
Indian	5	29	59	22	42	19	106	21
Private & State	5	30	45	16	25	11	75	14
Total	17	100	273	100	224	100	514	100

1/ Includes State and county park 50-year leases.
2/ About one-quarter mile in Nevada.

About forty miles, or 23 percent, of the BR-BLM shoreline are leased to states and counties for park purposes under 50-year leases. BLM responsibility on these lands is primarily lease compliance. Additional involvement includes minerals problems, rights-of-way, grazing, and burro management.

An additional fifty five percent of the BR-BLM shoreline is encumbered by a variety of leases, permits, trespasses and other special reservations as shown in the "Encumbrance of BR-BLM Shoreline" table. About 39 miles, or 22 percent, of the BR-BLM shoreline remain unencumbered. About thirty percent of this is topographically marginal for major development.

Encumbrance of BR-BLM Shoreline

	Nevada		Arizona		California		Total	
	Mi.	%	Mi.	%	Mi.	%	Mi.	%
Nev.Colo. R. Comm.	7	100					7	4
State & Co. Park leases (50-yr.)			29	33	11	13	40	23
Wildlife Mitigation			5	6			5	3
BR Opn. & Security zones			3	3	10	12	13	7
Proposed Ind. leases					17	20	17	10
Concession leases (20-yr.)			2	2	2	2	4	2
Cabin Site leases (20-yr.)			1	1	3	4	4	2
Permits (Ag., Resid., Comm.)			2	2	15	18	17	10

Encumbrance of BR-BLM Shoreline (Continued)

	Nevada		Arizona		California		Total	
	Mi.	%	Mi.	%	Mi.	%	Mi.	%
Agric. Trespass			4	5	4	5	8	4
Private Legislation			1	1	5	6	6	3
International Boundary Res.			18	21			18	10
Unencumbered			22	26	17	20	39	22
Subtotal	7	100	87	100	84	100	178	100
Undetermined Status			11		24		32	
Total	7		98		105		210	

FOLD OUT IS TOO LARGE TO BE FILMED

SEP 8 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-3971

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

V.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents [redacted].

APPENDIX I

TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Reprint of an Article by Robert E. Lundquist Entitled Artificial Additions to Riparian Land: Extending the Doctrine of Accretion Contained in Volume 14, Number 2, of the Arizona Law Review Published by the College of Law of the University of Arizona.

ARIZONA LAW REVIEW

Artificial Additions to Riparian Land: Extending the Doctrine of Accretion _____ *Robert E. Lundquist*

College of Law
University of Arizona

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Note

Artificial Additions to Riparian Land: Extending the Doctrine of Accretion

Robert E. Lundquist

The banks of rivers are rarely, if ever, immobile. A fast flowing river will create erosion of the banks which will be carried as particles in suspension, while a gentle flow will cause deposition leading to accretion. If the volume of flow decreases, lands will be re-exposed or relicited. Twists and turns in the river channel will cause erosion on one bank and accretion on the other; if the terrain steepens or flattens, river speeds will vary with a concomitant variation in the rate of erosion or accretion. Naturally, innumerable combinations of these factors lead to a myriad of results.

Ownership of losses and additions caused to lands by these natural phenomena is governed by various water rights doctrines including accretion, avulsion, reemergence, and navigability. A further complication arises, however, when the actions of man serve as a catalyst for natural bank movements. Some jurisdictions distinguish between natural and artificially induced losses and gains, while others make no distinction and apply the same doctrine to both types of situations.

Dredging operations by the United States Bureau of Reclamation to re-channel parts of the Colorado River,[1] which is navigable,[2] have already surfaced over 2,700 acres of land between the natural river

1. The Colorado River re-emerges from Lake Mead through Hoover Dam and winds its way over 500 miles to the Gulf of California, forming the western boundary of the State of Arizona. In certain areas along the river, the boundary between Arizona and the States of California and Nevada is set by agreement; thus the middle thread of the river may or may not coincide with the actual boundary. *See* State v. Bonelli Cattle Co., 107 Ariz. 465, 467, 489 P.2d 699, 701 (1971), *modified*, 108 Ariz. —, 495 P.2d 1312 (1972).

2. See text accompanying notes 28-31 *infra*.

bank and the narrower new channel.[3] Future dredging will expose more land. In a recent case of first impression, *State v. Bonelli Cattle Company*,[4] the Supreme Court of Arizona declined to extend the doctrine of accretion to man-made additions to riparian land. Instead it chose to ignore all the reasons underlying the development of the accretion doctrine and adopted, in a cryptic opinion, a distinction between natural and man-made accumulations to riparian land. Portions of the lands exposed by the dredging operations, including the lands involved in *Bonelli*, originally had been dry lands which were then submerged by erosion. The court also declined to apply the doctrine of reemergence[5] to such re-exposed lands. The Arizona court held that title to such surfaced land vests not in the adjacent riparian owner, as the accretion doctrine would require for natural accretions,[6] but in the state, which owns the beds of navigable rivers to the ordinary high water mark.[7]

A supplemental opinion denied rehearing and purported to clarify the definition of the high water mark.[8] In holding that the high water mark to which state ownership extends was fixed by the natural state of the river as it existed in 1938, the court ignored a virtually unanimous body of authority to the contrary,[9] misapplied a federal statute,[10] and rejected a federal decision directly on point dealing with federal lands in Arizona riparian to the same river.[11] The year 1938 was chosen because after that date the operation of Hoover Dam artificially affected the rate of flow of the Colorado River. The court reasoned that since the state at that time owned the river bed up to the then high water mark, artificial alterations in the river by the federal government could not operate to divest the state's title to these lands.

The following discussion will analyze *Bonelli* and its implications. In order to facilitate a full understanding of the case and to evaluate the court's treatment of the problems, it is first necessary to explore in depth the origins of and reasons for the principle that the state holds title to the beds of navigable rivers, the doctrines of accre-

3. Letter from Andrew L. Bettwy, Arizona State Land Commissioner, to *Arizona Law Review*, Dec. 8, 1971, on file in its offices.
4. 107 Ariz. 465, 489 P.2d 699 (1971), *rehearing denied & opinion clarified*, 108 Ariz. —, 495 P.2d 1312 (1972), *rev'g* 11 Ariz. App. 412, 464 P.2d 999 (1970).
5. See text accompanying notes 55-61 *infra*.
6. See text accompanying notes 37-40 *infra*.
7. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).
8. State v. Bonelli Cattle Co., 108 Ariz. —, 495 P.2d 1312 (1972).
9. See text & notes 62-67 *infra*.
10. 43 U.S.C. §§ 1301-1343 (1970) (Submerged Lands Act). See text accompanying notes 32-36, 105-110 *infra*.
11. United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970), *aff'g* 279 F. Supp. 87 (D. Ariz. 1967).

tion, avulsion and re-emergence, and recent extensions of the doctrine of accretion to artificial additions to riparian land. Following analysis of the case, an examination will be made of the impact of *Bonelli* on the existence of vestigial riparian rights in Arizona. Finally, we will investigate some problems of federal jurisdiction inherent in the *Bonelli* situation, which may arise when the river is dredged adjacent to some of the vast stretches of federal and Indian lands that lie within the state and abutt the river,[12] and in the application of the state definition of the high water mark to such lands.

The Common Law: Title to Beds of Navigable Waterways, Accretions and Relictions

Ownership of Beds of Navigable Waterways

Although navigable waterways and the lands submerged beneath them have been the subject of much legal literature,[13] it will be helpful for later discussion to review the basic principles regarding this confusing area of the common law. Aside from rights to the use of water, two elementary interests exist in a navigable waterway: the proprietary interest in the submerged lands, and the sovereign interest in guaranteeing the public right of navigation. The former is said to be burdened by a servitude in favor of the latter under both English and American law.[14]

By the English common law, the situs of the title to the beds of navigable waterways is unrelated to the protection of navigation. The *jus publicum*,[15] a characterization of the public right to navigate and pursue commerce over the water highway, exists over all waterways navigable in fact, whether the beds are held by a private person or by the crown.[16] Because of a complicated historical background, however, a distinction developed between tidal and nontidal waterways when a question as to ownership of the bed of a particular waterway arose. Under this rule the beds of nontidal waterways are presumed to have been conveyed to the adjacent riparians, while the beds of tidal waters are presumed to be vested in the crown. This distinction was based not on the principle that title to beds of naviga-

12. Arizona Department of Planning & Development, U.S. Bureau of Land Ownership in Arizona (U.S. Geol. Surv. map 1971).

13. *See* 1 H. Farnham, Waters and Water Rights § 36, at 165-175 (1904); Fraser, *Title to Soil Under Public Waters—A Question of Fact*, 2 Minn. L. Rev. 313 (1918); 1 Waters and Water Rights §§ 35-44, at 179-279 (R. Clark ed. 1967).

14. *See* Fraser, *supra* note 13. *See also* S. Rep. No. 133, 83d Cong., 1st Sess., pt. 1, 77-81 (1953).

15. *Id.*

16. *Id. See also* Reece v. Miller, 51 L.J.R. 64 (Magis. Cas. 1882).

ble waterways should be in the crown in order to protect navigation, but upon historical considerations peculiar to England and unrelated to the protection of navigation.[17]

Although utilizing the relatively simple English scheme as a foundation, the United States developed a more complicated system of public and private rights in navigable waters. The Supreme Court of the United States rejected the English distinction between tidal and nontidal waters for situs of title purposes, reasoning that the title to lands submerged beneath all navigable waters should be held by the sovereign in order to protect navigation.[18] This holding and other decisions effected a dedication of the beds of all navigable waterways held by the state to public use.[19] Under this theory, each of the original thirteen colonies had succeeded to the proprietary interest in the beds beneath their navigable waters, tidal and nontidal, formerly held by the English Crown. Upon ratification of the Constitution, however, the new states, while retaining the proprietary interest in the beds, surrendered the dominant sovereign interest in the protection, control, and improvement of navigation to the federal government.[20]

---

17. It has been demonstrated that the English rule as to ownership of the beds beneath nontidal waters is a presumption which grew out of English history. Fraser, *supra* note 13. Fraser's thesis is that the primitive peoples landing on the shores of England seized whatever land was of value and that presumably such beds were included. Later, during the Anglo-Saxon and Norman periods, grants of the upland from the sovereign expressly included the bed of the adjacent stream. His discussion concludes by noting that the United States had no such history, and argues, therefore, that no such presumption should be indulged in this country. *Id.*

18. Barney v. City of Keokuk, 94 U.S. 324, 338 (1876); *cf.* Donnelly v. United States 228 U.S. 243 (1913). *See also* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842); Shively v. Bowlby, 152 U.S. 1, 49 (1894).

19. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). Professor Sax explores the question of whether a state may alienate the title to public trust lands, such as a portion of the bed of a navigable waterway, or otherwise change the use to which trust lands are dedicated. On the one hand, if the trusteeship of lands held for the public puts such land wholly beyond the police power of the state, making them inalienable and unchangeable in use, then the public right would be quite an extraordinary one. On the other hand, if land held in trust for the public by the state may be transferred to private use through the exercise of the police power, then the trust imposes no restraint on government beyond that which is implicit in the judicial review of any state action. Professor Sax concludes that the duties imposed on the state lie somewhere between these two extremes. Judicial scrutiny of transactions involving lands held in trust for the public, such as the bed of a navigable watercourse, may be the only efficient means to enforce the state's duty since many administrative and even legislative authorizations of transfers of such land to private interest are not usually subject to public scrutiny. *See* Parks v. Simpson, 242 Miss. 894, 137 So. 2d 136 (1962). *Contra*, Texas Oyster Growers Ass'n v. Odom, 385 S.W.2d 899 (Tex. Ct. Civ. App. 1965). *See also* 1 H. FARNHAM, *supra* note 13, § 36a, at 172-75.

Assuming the finality of the *Bonelli* decision, the land claimed by Arizona may be subject to the public trust doctrine and require judicial surveillance of the use to which such land is put. It is arguable that the subject land and other lands similarly obtained must be put to a use which corresponds to the trusteeship, namely promotion of navigation, fishing, and recreation. See text accompanying note 134 *infra*.

20. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871); First Iowa Hydro-Elec. Co-op. v. Federal Power Comm'n, 328 U.S. 152 (1946); U.S. CONST. art. I, § 8. *See also* Arizona v. California, 283 U.S. 423 (1931).

The states may exercise sovereign control over their navigable waters only where not inconsistent with the federal servitude. The American *jus publicum*, therefore, is protected both by the federal and state navigational servitudes no matter who holds title to the bed.[21]

As new states were forged out of the federal territories after the formation of the Union, title to the lands beneath navigable waters in those areas passed from the federal government to the respective states under the equal footing doctrine.[22] Since the original states hold title to the beds of their navigable waters, the same situation must obtain in the new states, otherwise their footing would not be equal. In like manner, the new states were also granted sovereign power over their navigable waters subject to the dominant federal control.

The opportunity thus existed for the states to adopt a presumption that title to the beds of navigable waterways, tidal as well as nontidal, remained in the state unless an express grant to a private party could be shown.[23] Many American jurisdictions, however, chose the view that the English presumption as to nontidal beds was to be applied as a rule of law or as a rule of construction of grants.[24] The rule in these states is that a grant of land bounded by nontidal water—even where the body is navigable—includes the bed to the middle thread.[25] The Supreme Court of the United States has assented to this view, saying that it is for the states to determine whether to surrender their rights to the riparian owners on nontidal navigable waterways.[26] In the absence of such an election by the state, the presumption arises that it retains title to the beds of all navigable waterways unless an express conveyance is shown.

The problem, then, is what constitutes "navigable" water such that the presumption attaches to the bed. There are three definitions of navigability in the United States, depending upon the situation to which the term is applied. The first, which is beyond the scope of this discussion, is a very broad definition[27] applied to determine the

21. *See* Fraser, *supra* note 13.
22. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 222-23, 228-30 (1845) (Alabama became titleholder of lands submerged beneath navigable waters located therein upon statehood, and, therefore, federal grant after statehood of reclaimed lands was of no effect).
23. Barney v. City of Keokuk, 94 U.S. 324, 338 (1876). *See also* United States v. Oregon, 295 U.S. 1, 14 (1935).
24. *See* note 17 *supra*.
25. Archer v. Greenville Sand & Gravel Co., 233 U.S. 60 (1914) (applying Mississippi law); Buttenuth v. St. Louis Bridge Co., 123 Ill. 535, 537, 17 N.E. 439, 445 (1888) (dictum); Strange v. Spaulding, 17 Ky. L. Rptr. 305, 29 S.W. 137 (Ky. App. 1895); Krumweide v. Rose, 177 Neb. 570, 129 N.W.2d 491(1964); Mariner v. Shulte, 13 Wis. 775 (1861).
26. Barney v. City of Keokuk, 94 U.S. 324, 338 (1876).
27. *E.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

reach of the commerce clause and federal power over waters.[28] The second is used to determine the existence or nonexistence of a public right of use analogous to the *jus publicum*. For example, suppose *X* owns land through which a stream runs. *X* also owns the bed. The stream at places is only a few inches deep. May *Y* canoe over *X*'s stream freely or would *Y* be a trespasser? A majority of jurisdictions hold that *Y* has the right of passage.[29]

The third and narrowest definition of navigability, the one which has most relevance to this analysis, is applied to determine whether the state presumptively holds title to the bed of the watercourse. The presumption attaches if the body of water in question was being used as a highway at or around the time of the admission of the particular state to the Union.[30] It is the bed of this type of navigable waterway which is presumptively held by the state. Arizona, for example, was admitted to the Union in 1912. Around that time the Colorado River was being used as a highway by rivercraft from Yuma on the Mexican border to just below the present site of Hoover Dam. The bed of this stretch of the river, therefore, is held by the state in trust for its people in the absence of the showing of an express grant of a portion of the bed.[31]

The Effect of the Submerged Lands Act

In order to clear up the controversy surrounding conflicting state and federal claim of ownership of the coastal tidelands, Congress passed the Submerged Lands Act in 1953.[32] The Act amounted to

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28. *See* materials cited at note 20 *supra*.

29. *E.g.*, People v. Mack, Civil No. 12936 (Cal. App., Sept. 15, 1971), 3 BNA ENV. REP. CAS. 1391 (1971); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961); *cf.* State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945). *See also* Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952). *But see* Hartman v. Tresise, 36 Colo. 146, 84 P.2d 685 (1905).

30. Utah v. United States, 403 U.S. 9, 11 (1971) (the waterway need not have been used for *commercial gain* under the test); *see* Teclaff & Teclaff, *Saving the Land-Water Edge From Recreation, For Recreation*, 14 ARIZ. L. REV. 39, 43-48 (1972). *Id.*

31. Arizona v. California, 283 U.S. 423, 453 (1931).

32. 43 U.S.C. §§ 1301-1343 (1970).

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable water within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease and develop, and use the said lands and natural resources . . . are, subject to the provisions hereof, recognized, confirmed, established and vested in . . . the respective States . . . .
>
> . . . .
>
> (d) Nothing in this chapter shall affect the use, development, improvement or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any of the rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide flood control, or the production of power.

Id. § 1311.

a federal quit-claim of all lands submerged beneath navigable waters within state boundaries. This included both inland waters and coastal waters within the seaward boundaries of the states. It renounced federal claims of ownership of, *inter alia*,

> all lands . . . covered by non-tidal waters that were navigable under the laws of the United States at the time such state became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . .[33] and] all filled in, made or reclaimed lands which formerly were lands beneath navigable waters, as herein above defined . . . .[34]

The Act expressly declares that it is to have no effect on private claims to such lands based upon the laws of the United States.[35] It merely confirmed the existing case law holding that, as between the state and federal governments, the title to the beds of nontidal navigable waters is *not* in the federal government. This leaves the states the presumption that, as between the state and a private party, the former holds title.[36]

The Act also implicitly confirms existing case law with respect to claims to intervening accumulation to riparian land based upon the accretion doctrine since the state presumptively holds title to beds "as heretofore or hereafter modified by accretion, erosion, and reliction." Thus, under the Act as well as under accretion law, the state's title follows the navigable water and is not a fixed parcel of land.

Doctrines of Accretion, Avulsion and Reemergence

1. *Accretion.* Accretion is the gradual and imperceptible accumulation of land by natural causes out of the sea or other body of water.[37] Accreted land is of two kinds, one by *alluvion* and one by *dereliction*. Alluvion is land added by the deposition of silt and debris out of the water.[38] Derelicted or relicted land is land added by the recession of the water leaving a portion of the bed dry.[39] Both

33. *Id.* § 1301(a)(1).
34. *Id.* § 1301(a)(3).
35. *Id.* § 1315.
36. *See* S. REP. No. 133, 83d Cong., 1st Sess., pt. 1, at 6-8, 65, 77-81 (1953). "The purpose of this legislation is to write the law for the future as the Supreme Court [of the United States] believed it to be in the past—that the States . . . own and have proprietary use of all lands under navigable waters within their territorial jurisdiction . . . subject only to the governmental powers delegated to the United States by the Constitution." *Id.* at 8.
37. Nebraska v. Iowa, 143 U.S. 359 (1892).
38. United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970), *aff'g* 279 F. Supp. 87 (D. Ariz. 1967).
39. Fontenelle v. Omaha Tribe of Nebraska, 298 F. Supp. 855 (D. Neb. 1969), *aff'd*, 430 F.2d 143 (8th Cir. 1970).

are governed by the same principles:[40] title to accreted land is awarded to the upland owner irrespective of who owns the bed.

The doctrine of accretion is based on several rationales. One derives from the Roman theory of accession—where a cow produces offspring or a tree produces fruit, the owner of the cow or the tree becomes the owner of the calf or the apple.[41] So the owner of riparian land owns accreted lands. Another rationale given is that where a body of water is a boundary between landowners or political entities, that body should remain the boundary.[42] Thus the legal boundary moves with gradual changes in the location of the water. The middle thread of the Colorado River, for example, is the boundary between California and Arizona. In some areas the action of the water erodes the west bank while depositing alluvion on the east bank, causing the river channel to move gradually westward. The boundary between the two states follows the movement of the channel. Where the shoreline is the boundary between the upland and the state-owned bed, accretion or erosion can cause the upland to gain or lose ground since the legal boundary follows the shoreline.

A third rationale is that where land is gained from a body of water by "little . . . and imperceptible degrees, it shall go to the owner of the land adjoining [for] *de minimis non curat lex*."[43] This magical incantation, "the law does not care for trifling matters," appears to have been an addition by English courts adopting the accretion doctrine. The adoption of the de minimis concept set the stage for a legal distinction between gradual changes and sudden changes

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40. *Id.* at 858.

41. R. SOHM, THE INSTITUTES 323 (J. Ledlie transl. 3d ed. 1907):

> Accession is the name given to a thing which, having previously existed as an independent thing, has passed into an integral part of another thing. . . . A thing which becomes an accession ceases to have an independent existence. . . . As soon . . . as a thing becomes an accession, all former right of ownership in it are destroyed, because its existence as an independent thing is destroyed. . . .
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> . . . [Examples of accession:] 'alluvio,' . . . the accretion by which a public river, in an imperceptible manner, enlarges a plot of land; 'avulsio,' . . . the accretion by which a public river enlarges a plot of land in a perceptible manner [inures to the riparian]; . . . 'alveus derelictus,' . . . the derelict bed of a public river which has changed its channel (the bed, which thus becomes free, becomes the property of the riparian owners on each side as an accession, the middle bed forming the boundary); 'insula nata,' . . . a term applied when part of a public river becomes free, the rule in such a case being the same as with an alveus derelictus.

See also Manry v. Robinson, 122 Tex. 213, 56 S.W.2d 435 (1932); R. LEE, THE ELEMENTS OF ROMAN LAW 132 (4th ed. 1956).

42. *E.g.*, Anderson-Tully Co. v. Tingle, 166 F.2d 224, 227-28 (5th Cir. 1948), *cert. denied*, 335 U.S. 816 (1948); Mecca Land & Exploration Co. v. Schlecht, 4 F.2d 256 (D. Ariz. 1925); Mood v. Banchero, 67 Wash. 2d 835, 410 P.2d 776 (1966). *See* Annot., 41 A.L.R. 382 (1926).

43. 2 W. BLACKSTONE, COMMENTARIES *262; *see* BLACK'S LAW DICTIONARY 482 (4th ed. 1951).

along waterways.[44] No such distinction was drawn in Roman law.[45]

Another reason given for the accretion doctrine is what has been called the "productivity theory,"[46] which holds that the law as a matter of policy should favor productive uses of lands. Since the riparian owner is in a better position than the state or a stranger to utilize accreted land, the courts declare title to be in him. Giving the upland owner accreted land as it is formed allows him to put it to immediate use instead of having title pass through the sovereign.[47]

A fifth justification is compensation. Since the riparian owner is subject to losing land by *erosion*, he ought to benefit from any addition.[48] Nor should he be cut off from the stream. Therefore, the final and perhaps most important reason for the doctrine is to preserve the riparian character of the upland. The quality of being riparian, especially to navigable water, is a valuable asset and is part and parcel of the ownership of such land.[49] By requiring that the

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44. 2 W. BLACKSTONE, COMMENTARIES *262.

45. See note 41 *supra*. *See also* State v. Bonelli Cattle Co., 107 Ariz. 465, 469, 489 P.2d 699, 703 (Lockwood, J., dissenting). The de minimus theory deals not with de minimus *quantities* of land but with de minimus *increments* to land such that the increments are gradual and imperceptible. The test was stated by the Supreme Court of the United States: "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68 (1874). Most cases dealing with accreted land involve more than de minimus amounts of land. For example, the swift and wild meandering of the Missouri River has caused large areas of accreted land in weeks or months. *See* Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N.D. L. REV. 429 (1967).

46. *See* Beck, *supra* note 45. *Cf.* Jefferis v. Eastern Omaha Land Co., 134 U.S. 178, 191 (1890); Banks v. Ogden, 69 U.S. (2 Wall.) 57, 67 (1864); Adams v. Frothingham, 3 Mass. 352 (1807); Gifford v. Yarborough, 130 Eng. Rep. 1023, 1024 (C.P. 1828).

47. *Cf.* Gifford v. Yarborough, 130 Eng. Rep. 1023, 1024 (C.P. 1828). *See also* Beck, *supra* note 45.

48. *E.g.*, County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 69 (1874); United States v. 11,993.32 Acres of Land, 116 F. Supp. 671, 678 (D.N.D. 1953); Hall v. Brannan Sand & Gravel Co., 158 Colo. 201, 204, 405 P.2d 749, 750 (1965); Burke v. Commonwealth, 283 Mass. 63, 186 N.E. 277 (1933).

49. *E.g.*, Hughes v. Washington, 389 U.S. 290, 294 (1967); Philadelphia Co. v. Stimson, 223 U.S. 605, 624 (1912); *see* Merryman v. Goins, 190 Okla. 442, 444, 124 P.2d 729, 731 (1942) (adjoining riparian owners to maintain same proportion of riparian land in accreted lands as they had in pre-accretion situation). The Minnesota court has expressed this view of the accretion doctrine:

> But it seems to us that the [accretion] rule rests upon a much broader principle, and has a much more important purpose in view, *viz.* to preserve the fundamental riparian right—on which all others depend, and which often constitutes the principle value of land—of *access to the water*.
>
> The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the waterline had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts. [Emphasis Added.]

Lamprey v. State, 52 Minn. 181, 197, 53 N.W. 1139, 1142 (1893). There appears to be no logical reason for reaching a contrary result where an intervening third party causes changes in the river. The riparian owner is subject to the whim of the federal government in the exercise of the navigation servitude as much as he is subject to the wanderings of the river. *See* materials cited at note 77 *infra*.

upland owner suffer the burden of erosion and by giving him the benefit of accretion, riparianness is maintained. All of the rationales are somewhat interrelated, and many of the earlier opinions contain references to most if not all of them.[50]

2. *Avulsion.* Whereas accretion is the gradual and imperceptible[51] addition of land, avulsion is the "rapid, easily perceived, and sometimes violent, shifts of land incident to floods, storms or channel breakthroughs."[52] In contrast to erosion or accretion, avulsive shifts do not result in changes in legal boundaries. The avulsion doctrine stabilizes the location of titles even though the river or ocean may swallow some lands and resurface others.[53] For instance, *A* and *B* are riparian owners on opposite sides of a river. Due to a flood the river takes a new course running through the middle of *A*'s parcel. The old bed which is now dry remains the boundary between parcel *A* and parcel *B* even though *B* is no longer riparian to the new channel. In other words, the courts have chosen the policy that where there is a fortuitous *sudden* change in the location of the river bed, the riparian right of one is extinguished by the fee ownership of land by another. If the state owns the bed of the river in the example, the state retains title to the old bed. *A* holds title to the new bed since the river is now running over his land. If the river were the

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50. *See, e.g.*, County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874); Adams v. Frothingham, 3 Mass. 352 (1807); State *ex rel.* McKay v. Sause, 217 Ore. 52, 342 P.2d 803 (1959).

51. *See* note 45 *supra.*

52. Bauman v. Choctaw-Chickasaw Nations, 333 F.2d 785, 789 (10th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965).

53. *Id.* *See* Nebraska v. Iowa, 143 U.S. 965 (1965).

Blackstone said that the doctrine of avulsion would also apply if there were a sudden loss of land by a riparian owner and a sudden increment of land across the river or downstream: "he shall have what the river has left in any other place, as a recompense for this sudden loss." 2 W. BLACKSTONE, COMMENTARIES *262, 263. It has been widely held, however, that where the loss of one's land is visible and sudden, unless there is a deposit of the identical land somewhere else (which is physically impossible since land loses its identity in the collodial suspension of the river) the land added downstream or across the river is still presumed to be accreted. In Nebraska v. Iowa, 143 U.S. 359 (1892), for example, the court noted that large parts of the river bank involved fell into the river, disintegrated, and were deposited downstream, and stated:

> But it has been held by this court that the general law of accretion is applicable to land on the Mississippi River; and that being so, although the changes on the Missouri River are greater and more rapid than on the Mississippi, the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of law. . . .
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> . . . There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and the deposit of the same on the other.

Id. at 367, 369. *See also*, Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890).

Another example of the operation of the avulsion doctrine is where *C* owns land with an ocean-front. While the shore is above sea-level, the land behind the shore is dry but just below sea-level. A storm causes the ocean to wash away the shore and submerges *C*'s land. *C* does not lose title.

least bit navigable, however, *A*'s title would be burdened with the navigation easement.

New land abutting a waterway is presumed to be accretive rather than avulsive.[54] Since an avulsive change would certainly be noticed at or shortly after the time of the sudden natural phenomenon, witnesses would be available to testify to the occurrence. Such would not be the case where the gradual accretive process has occurred. Thus, in the absence of such proof, a change is presumed to be accretive.

3. *Reemergence.* Where a landowner loses acreage to a navigable river by erosion, title to this acreage is transferred by law from him to the state or owner of the bed. If the river were to move in the other direction and replace that same acreage with accreted land, the landowner would obtain title by the doctrine of accretion. If the river moved by an avulsive shift rather than by slow and imperceptible accretive movements, some jurisdictions recognize the "doctrine of reemergence," and hold that the title to such land re-vests in its former owner.[55] In *Mulry v. Norton*,[56] for example, plaintiffs had lost littoral land to the sea. Later, land began accreting to defendants' adjacent land as well as to plaintiffs' land. The Massachusetts court declared that title to the lost land re-vested in the plaintiffs:

> It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner or suffices to enable another to acquire it. . . . Land lost by submergence may be gained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. When portions of the mainland have been gradually encroached upon by the ocean, so that navigable channels have extended thereover, the people, by virtue of their sovereignty, having authority over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of permanent acquisition by the sea. It is equally true, however, that *when the water disappears from the land*, either by its gradual retirement therefrom or the elevation of the land *by avulsion* or accretion, *or even the exclusion of the water by artificial means*, that its proprietorship returns

54. *E.g.*, Hall v. Brannan Sand & Gravel Co., 158 Colo. 201, 214, 405 P.2d 749, 750 (1965).

55. Herron v. Choctaw & Chickasaw Nations, 228 F.2d 830 (10th Cir. 1956); Klais v. Danowski, 373 Mich. 262, 129 N.W.2d 414 (1964); Mulry v. Norton, 100 N.Y. 424, 3 N.E. 581 (1885); Hunzicker v. Kleeden, 161 Okla. 102, 17 P.2d 384 (1932). *See also* Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966) (recognizing rule); *In re* City of Buffalo, 206 N.Y. 319, 99 N.E. 850 (1912) (recognizing rule); Annot., 41 A.L.R. 382 (1926).

56. 100 N.Y. 424, 3 N.E. 581 (1885).

> to the original riparian owners. . . . Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship . . . .[57] [Emphasis added.]

This rationale has been followed in other jurisdictions[58] and reason seems to commend it. Since the advance of the water divested the title of the upland owner to the state in order to guarantee full public enjoyment of the watercourse,[59] when the water recedes from the land, there is no longer a public benefit to be protected. Consequently, the state has no need for the title. That the cause of the recession of the waters is "artificial" or man-made should be of no effect. Title should re-vest in the former owner unless the land was created as part of a navigational project of which it is a necessary and integral part,[60] or unless the artificial addition is caused by the upland owner without government approval.[61]

Accretions Caused in Part or in Whole by the Works of Man

There are basically three types of "unnatural" land accumulations along a waterway. The first is distinguishable from natural accretion only because man has interfered with the currents of the waterway, thus causing an accretion where otherwise there would be none. For example, where a state builds a dike and a city dumps debris into a river to protect a harbor,[62] or the federal government builds a dam,[63] or a third party builds a revetment to protect a right-of-way,[64] these actions affect the currents and the rate of flow of the water and cause *"artificial accretions."* The accretions are in fact natural; only the cause—an upstream dam, for example—is artificial. The general rule is that accretions of this kind inure to the upland owner.[65] The rea-

57. *Id.* at 434, 3 N.E. at 584-85.
58. Herron v. Choctaw & Chickasaw Nations, 228 F.2d 830 (10th Cir. 1956) (applying Oklahoma law); Hunzicker v. Kleeden, 161 Okla. 102, 17 P.2d 384 (1932).
59. See text & note 18 *supra*. *Cf.* cases cited in note 29 *supra*.
60. *See* Michaelson v. Silver Beach Imp. Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961).
61. *See* Burns v. Forbes, 412 F.2d 995 (3d Cir. 1969).
62. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874).
63. United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970); Beaver v. United States, 350 F.2d 4, 11 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966). *See also* Solomon v. Sioux City, 243 Iowa 634, 51 N.W. 2d 472 (1952). In *Solomon* the federal government built a series of dikes and jetties which caused an artificial reliction of the river and slowed the current. Within 2 to 3 years the upland had been extended by over 300 feet of relicted and accreted land. Title was held to be in the upland owner and not in the city as grantee of the state and owner of the bed.
64. Littlefield v. Nelson, 246 F.2d 936 (10th Cir. 1957).
65. *E.g.*, County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 69 (1874); Abbot Kinney Co. v. City of Los Angeles, 340 P.2d 14, 19-21 (Cal. App.), *vacated*, 53 Cal. 2d 52, 346 P.2d 385 (1959); *see* Krimlofski v. Matters, 174 Neb. 774, 119 N.W.2d 501 (1963). *See also* cases cited in note 62 *supra*.

son for this rule, as stated by the United States Supreme Court, is that "the proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural or affected by artificial means is immaterial."[66] The vast majority of courts place no reliance on the distinction between artificial and natural causes which affect the flow of the water, looking to the speed of change and not the source.[67]

A second type of unnatural addition to riparian land may occur where a human agency has caused land to appear out of the water by what may be termed *direct action*. Thus by filling or by partial relocation of the waters at the point of the disputed parcel, otherwise natural accretions attach to that land. The human agency has therefore caused a natural accretion by means both artificial and direct, a *point-induced accretion*. For instance, riparian owners have been held to acquire title to land where garbage deposits next to the riparian by third persons accelerated accretion to their riparian land.[68] In another situation the Corps of Engineers rechanneled the Mississippi river causing most of the river water to flow through the new channel, although there was still an intermittent flow in the old channel.[69] A reliction occurred in the old channel because of the diversion of most of the water, and alluvion attached to this land because of the intermittently sluggish flow. Plaintiff was a stakeholder seeking a declaration as to whom it should pay royalties for oil well production on this land. The Louisiana court held that the riparian owner, not the state as owner of the bed, held title to the subject land. The court reasoned that there is no distinction between accreted lands caused "primarily" or "partly" by the works of man.[70] Similar results have been reached in other jurisdictions.[71]

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66. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 69 (1874).

67. *See generally* Annot., 134 A.L.R. 467 (1941). *See also* Adams v. Frothingham, 3 Mass. 352 (1807). *But see* Patton v. City of Wilmington, 169 Cal. 521, 147 P. 141 (1915).

68. Nordale v. Waxberg, 84 F. Supp. 1004, 1005 (D. Alas. 1949), *aff'd*, 182 F.2d 1022 (9th Cir. 1950). On the other hand, the upland owner was denied title to accreted land where he dumped oyster shells into the water fronting his land causing an increase in the rate of accretion. Lorino v. Crawford Packing Co., 142 Tex. 51, 175 S.W.2d 410 (1943). *See also* City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789 (1929) (accretions caused partly by dike and partly by portions of the dike sliding into water providing abundance of alluvial material in local waters held vested in the grantee of the state as the owner of the tideland and not in the upland owner); Carpenter v. City of Santa Monica, 63 Cal. App. 2d 772, 789, 147 P.2d 964, 972 (1944) (construction of dike and dumping of materials into waters caused accretions which remained vested in the state's grantee and did not vest in the upland owner); Los Angeles Athletic Club v. City of Santa Monica, 63 Cal. App. 2d 795, 147 P.2d 976 (1944).

69. Esso Standard Oil Co. v. Jones, 233 La. 915, 98 So. 2d 236 (1957), *aff'd on rehearing*, 233 La. 940, 98 So. 2d 244 (1957).

70. *Id.* at 934, 98 So. 2d at 241.

71. *E.g.*, Sieck v. Godsey, 254 Iowa 624, 118 N.W.2d 555 (1962); *see* Krumweide v. Rose, 177 Neb. 570, 129 N.W.2d 491 (1964). *But see* cases cited in note 68 *supra*.

The third category of unnatural additions to riparian land, which probably includes the *Bonelli* dredging situation,[72] embraces land created at the waters' edge by direct filling or dredging, rather than by a man-induced accretive process—"artificial accretion" or "point-induced accretion." This *reclamation* is neither alluvion nor dereliction since it is created by the action of man rather than nature, and since its formation is neither gradual nor imperceptible. Ordinarily, a riparian or littoral owner cannot acquire title to land which he created by filling in the publicly owned bed of a navigable water-course.[73] Where the reclamation of land by filling or dredging of the adjacent submerged land is expressly permitted by statute, however, it is generally held that, so long as the public rights with respect to navigation and commerce are not substantially impaired, filled land created by a riparian proprietor belongs to him as part of the upland.[74]

Where the state or its grantee as the owner of the bed has filled in the submerged land, it is generally held that the state retains title to such reclaimed land even though it may eliminate the riparian character of the upland.[75] In some jurisdictions, however, it is required that the reclaimed land be an integral part of a navigational project for this result to obtain.[76] This requirement—referred to as the navigational purpose rule—is preferable since littoral or riparian rights are already subject to being extinguished without compensation in numerous other ways.[77] The rule is illustrated by *Michaelson v.*

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72. *Compare* State v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953), *with* State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971).

73. *E.g.*, Burns v. Forbes, 412 F.2d 995 (3d Cir. 1969); McDowell v. Trustees of Int'l Imp. Fund, 90 So. 2d 715 (Fla. 1956); Carli v. Stillwater Street R. Transfer Co., 28 Minn. 373, 10 N.W. 205 (1881); State *ex rel.* McKay v. Sause, 217 Ore. 52, 89-90, 342 P.2d 803, 821-22 (1959) (dictum).

74. *E.g.*, Holland v. Ft. Pierce Financing & Constr. Co., 157 Fla. 649, 27 So. 2d 76 (1946); Miller v. Mendenhall, 43 Minn. 95, 44 N.W. 1141 (1890) (statute fixing harbor line); Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895) (permit); Gough v. Bell, 22 N.J.L. 441 (1850), *aff'd on rehearing*, 23 N.J.L. 624 (1852) (local common law).

75. *E.g.*, United States v. California, 381 U.S. 139, 177 (1965).

76. Michaelson v. Silver Beach Imp. Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961).

77. *See* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963); Comment, *The State Navigation Servitude*, 4 LAND & WATER L. REV. 521 (1969); Note, *The Public Right of Navigation and the Rule of No Compensation*, 44 NOTRE DAME LAW. 236 (1968). *But see* United States v. 8,968.06 Acres of Land, 326 F. Supp. 546 (S.D. Tex. 1971), *rev'g* 318 F. Supp. 698 (S.D. Tex. 1970); Pub. L. No. 91-611, § 111, 84 Stat. 1818 (1971) (River and Harbor Act of 1970). The Act is a legislative reversal of United States v. Rands, 389 U.S. 121 (1967). *Rands* held that riparian owners need not be compensated for the value of their land due to its proximity to water where the parcel was being condemned. The Act provides that, where the federal government condemns real property

> in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken . . . above the normal high water mark of the navigable waters of the United States shall be the fair market value . . . based upon all the uses to which such real property may be put, including its

Silver Beach Improvement Association[77a] in which the Massachusetts department of public works authorized creation of a beach fronting on plaintiff's littoral land. The beach was created by dredging and pumping sand from the floor of the harbor in connection with a harbor improvement project. Plaintiff sought to enjoin defendant's use of the beach for public purposes and claimed title to the beach. An injunction was granted and title to the land surfaced by the operation was held to be in the plaintiff. The court reasoned that although the dredging and resultant beach were incident to a navigational project authorized by the legislature and financed by the public, the placing of the dredged material in front of *this particular upland* had no such navigational purpose. The dredged material could have been placed elsewhere. The court stated that to create a public playground as was done here, the state must resort to the welfare power and to the use of eminent domain. Because there was no substantial connection between the reclamation of the land interposed between the upland and the ocean, and the improvement of navigation, the littoral rights of the upland could not be taken without compensation. Other courts have reached the same result on the grounds that the upland owner had taken no part in creating the addition.[78]

A dredging case decided by the Alabama court is exemplary of third-party reclamation by dredging in the main channel and is remarkably similar to the *Bonelli* situation.[79] In order to gain access to the dock of an ammunition dump, the United States Government dredged a channel in Mobile Bay and cast the dredged material along the shoreline, including the portion owned by the plaintiff. This strip of dredged land cut off plaintiff's access to the bay. He received no compensation and could not have successfully demanded it of the federal government.[80] The Alabama court denied the state's claim to the new land, holding that the title was in the plaintiff as the upland owner. The court noted that although the federal government had the

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highest and best use, *any of which may be dependent upon access to or utilization of such navigable waters.* In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized . . . .

Pub. L. No. 91-611, § 111, 84 Stat. 1818 (1971). [Emphasis added.] The definition of "navigable" waters used in the Act is presumably the commerce clause definition. *See* notes 27-31 and accompanying text *supra.* What effect the Act will have on state condemnation proceedings remains to be seen. Absent a direct taking of real property, however, the federal and state navigational servitudes may burden the riparian with non-compensable injury.

77a. 342 Mass. 251, 173 N.E.2d 273 (1961).

78. Harrison County v. Guice, 244 Miss. 95, 140 So. 2d 838 (1962). *See* text & note 73 *supra.*

79. Sate v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953).

80. U.S. CONST. art. I, § 8. *See* materials cited note 77 *supra; cf.* United States v. Twin City Power Co., 350 U.S. 222 (1956).

implied sanction of the state as owner of the bed to dredge the channel,[81] that sanction was for the improvement of navigation and commerce, and not for the purpose of raising the bed above sea level. Noting the actual physical deposit of the dredged material in front of the upland, the court stated:

> It is obvious that we do not have in the case at bar an accretion by any slow or imperceptible processes. It has been suggested that the speeded up, artificial accretion, such as we have in the present case could well be called 'streamlined accretion' or perhaps a reclamation.
>
> . . . [W]here there is what we have termed a streamlined accretion . . . title to such made-land is conferred upon the upland owner, subject only to the paramount rights of the United States and the State in aid of navigation. We understand that the title to the bed or bottom beneath navigable waters is in the state, *but this is a title to the bed as a bed.* . . . The state still owns the title to the bed beneath navigable water, but the made-land being added to the property of the riparin or littoral owner becomes his property.[82] [Emphasis added.]

Thus the navigational purpose rule was reaffirmed. The new land had no substantial connection with the navigational project since navigation was not aided by placing the dredged material in front of this particular upland, and the new land was not needed as a part of the project.

ANALYSIS OF BONELLI

The River's Changing Path

Because the Colorado River was navigable in fact when the United States acquired sovereignty over it, its bed was not ordinary federal land but was held in trust for the people of the states which would be formed bordering the river.[83] Bonelli's predecessor in interest obtained a federal patent for the east one-half of a section of land[84] in

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81. 259 Ala. at 183, 66 So. 2d at 145.

82. *Id.* *See also* Adams v. Roberson, 97 Kan. 198, 155 P. 22 (1916); *cf.* Gillihan v. Cieloha, 74 Ore. 462, 145 P. 1061 (1915) (in absence of claim by state, upcast bed of navigable waterway inures to upland). *See also* Burns v. Forbes, 412 F.2d 997 (3d Cir. 1969) (holding that the doctrine of accretion does not extend to lands dredged by the upland owner without permission of governmental owner of bed; and indicating by dictum that the doctrine of accretion extends to third party's accretions artificially created by dredging and title to such land would inure to the upland).

83. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *But see* United States v. City of Anchorage, 437 F.2d 1081 (9th Cir. 1971) (federal patent of lands submerged beneath navigable waters issued to railroad 50 years before statehood was a valid conveyance).

84. E ½, Sec. 3, T 19 N, R 22 W, G&SRM. This parcel is located just north of the Fort Mohave Indian Reservation where the States of Arizona, California and Nevada converge.

1910, two years before Arizona's statehood. A United States Geological Survey Map dated 1902-03 showed the Colorado River approximately one-quarter of a mile west of this section. The river, however, moved steadily eastward from that time and it was not known at the trial whether the subject parcel was riparian at the time of the grant. If in fact the parcel was riparian at the time of the conveyance, the presumption would be that the federal grant of the upland did not include a grant of the adjoining river bed unless expressly made.[85] If such a grant could have been shown, the *Bonelli* situation would never have arisen because the upland and the bed would have been held under one title and there would have been no boundary present to move with the later encroachment of the river. Since there was no showing of such a grant, the federal government retained title to the adjacent bed.

Upon admission to the Union in 1912, the State of Arizona succeeded the federal government to the title of the bed of the Colorado River and held it in trust for the people of the state. The area in controversy in *Bonelli*, however, was not at that time part of that bed. It was then dry land owned by Bonelli's predecessor. It was generally agreed at trial that between 1903 and 1938 the river in this area gradually eroded its east bank and deposited alluvion on its west bank, resulting in the submergence by erosion of the disputed acreage and leaving dry approximately 60 acres in the southeast corner of the parcel.[86] As the river crept eastward, the boundary between the upland and the state-owned bed also moved mechanically eastward with this gradual encroachment, transferring the title to lands which had become a part of the bed from the riparian to the state.[87]

The operation of Hoover Dam beginning in 1938 reduced the flow of water in the Colorado. Local currents were affected, and the river stopped its eastward encroachment in the *Bonelli* area. Damming of the river may also have prevented or inhibited a possible subsequent reversal of direction of encroachment which would have accreted land on the east bank rather than eroding it. By the great weight of authority however, the operation of the dam has no legal effect on the doctrine of accretion and the latter remains in full force.[88] While the dam, like any other man-made obstruction, may affect the

85. *See* Fraser, *supra* note 13.

86. 107 Ariz. 465, 467, 489 P.2d 699, 701 (1971).

87. Even if the title had not been so transferred and the riparian had remained the owner of the submerged land, the public right of navigation would have been guaranteed through federal or state enforcement of the *jus publicum*. *See* text & note 21 *supra*. *See also* cases cited at note 29 *supra*.

88. *E.g.*, Beaver v. United States, 350 F.2d 4, 11 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966); *see* cases cited in notes 62-71 and accompanying text *supra*.

flow and currents of the river, the benefit of accretion and the detriment of erosion still fall where chance would have them.

Ownership of the Resurfaced Land

In 1955 *Bonelli* acquired a deed to the subject half-section which, with the exception of the 60 acres in the southeast corner, was at that time covered by water. Since submergence by erosion of navigable water extinguishes title in the upland, the deed could not have conveyed the fee to that portion of the parcel covered by the river. The state owned it rather than the grantor. The grantor did, however, possess an interest in the lost land if the doctrine of reemergence were to be followed.[89] This interest might be labeled an "expectancy" where the title would re-vest should the land be reexposed. In describing the submerged land, the deed presumably conveyed whatever interest the grantor possessed. This, therefore, would provide the basis for a claim to the land later re-exposed in 1960.

Some 10 years after the land was re-exposed by the federal dredging project, Bonelli brought this action to quiet title.[90] The suit was successful[91] in the trial and intermediate appellate courts, but met with reversal in the Supreme Court of Arizona. The plaintiff's argument that the doctrine of reemergence should apply to the exposed land was obliquely dismissed by the court: "We believe . . . that the dredging of the river is an engineering relocation of the waters . . . by artificial means and is not a true case of withdrawal or retrogression."[92] Under the doctrine of reemergence, however, neither the rate of accumulation nor the causative force should be considered;[93] the restoration of lost land may be gradual or sudden, natural or man-induced. Since title to land lost by erosion passes to the state, ostensibly to facilitate the protection of public rights in navigable waters,[94] when the land is left dry and no longer connected with that interest,

89. *See* text & notes 55-61 *supra*.

90. The quiet title action was brought as a preliminary step in the plaintiff's plans for the development of a river resort area on the parcel. Telephone interview with Elmer C. Coker, Attorney for Plaintiff, State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), *rehearing denied, & opinion clarified*, 108 Ariz. —, 495 P.2d 1312 (April 13, 1972), *rev'g* 11 Ariz. App. 412, 464 P.2d 999 (1970), Phoenix, Ariz., Jan. 24, 1972.

91. Both the trial court and the Arizona Court of Appeals held for the plaintiff. 11 Ariz. App. 412, 464 P.2d 999 (1970).

92. 107 Ariz. at 468, 489 P.2d at 702.

93. *See* Mulry v. Norton, 100 N.Y. 424, 3 N.E. 581 (1885); text accompanying notes 55-58 *supra*.

94. *Cf.* Barney v. City of Keokuk, 94 U.S. 324, 338 (1876):

> In order that the passage ways of commerce and navigation might be subject to public authority and control, title to land under water and to the shore below ordinary high water mark . . . [should be] vested in the [sovereign] for public use and benefit.

it should be restored to the upland no matter what the cause of resurfacing.[95]

The *Bonelli* plaintiff's second argument that the exposed land should be considered an "artificial accretion" to his upland was summarily rejected by the court, which observed that the addition of land in this case was neither gradual and imperceptible nor the result of natural causes.[96] A thorough analysis of this issue requires full consideration of both the theoretical and factual aspects of the situation presented. The dredging process undoubtedly affected the flow and currents of the river and produced three separate effects. The first two effects are closely linked. The dredging probably raised a great deal of sediment facilitating local alluvion deposition contemporaneously with the reliction of the waters caused by the deepening and narrowing of the channel. Third, spoil dredged from the river bed was deposited toward the banks of the river adding appreciably to the land accumulation. The three processes in concert thus brought about the disputed dry acreage. By the mechanics of the accretion doctrine, the alluvion deposition and reliction were presumptively gradual and imperceptible,[97] notwithstanding the human works in the river.[98] The

95. The upland owner may not, of course, reclaim any part of the bed without governmental permission.

96. 107 Ariz. at 468, 489 P.2d at 702. The cases cited by the court in support of the holding on this issue seem to have little relation to the *Bonelli* situation. Wilemon v. City & County of Dallas Levee Improvement Dist., 264 S.W.2d 543 (Tex. Civ. App. 1953), *cert. denied*, 348 U.S. 829 (1954), involved a plaintiff whose land had abutted a navigable river where the district had cut an entirely new channel away from plaintiff's land and had removed the waters completely from the old bed. Neither the question of reemergence nor of preservation of riparian access was involved and plaintiff's claim to the dried river bed was denied. Ray v. State, 153 S.W.2d 660 (Tex. Civ. App. 1941), involved the same type of total relocation of the waters of the navigable Trinity River. In that case, however, the state's title in the old bed was retained on the ground that the old bed was part of a navigation and river control project and might be needed for flood control.

State v. Aucoin, 206 La. 787, 20 So. 2d 136 (1944), is distinguishable in that the case involved the question of artificial relictions to land abutting a lake, and by Louisiana law the doctrine of accretion does not apply to lands abutting a lake. LA. CIV. CODE ANN. art. 509-10 (West 1952).

Padgett v. Central & S. Fla. Flood Control Dist., 178 So. 2d 900 (Fla. 1965), may also be distinguished from *Bonelli*. Although the Florida court declared that "[t]he doctrine of reliction . . . is applicable to additions created by recession of waters from natural causes; it does not apply to land reclaimed by drainage operations of governmental agencies," *id.* at 904, the court relied strongly on the ground that the plaintiff's predecessor's grant and plaintiff's deed contained a reservation in the state, declaring that the state could carry out such reclamation and retain title to the bed, and thus plaintiff had notice and could not complain.

97. *See* note 53 *supra*.

98. *See* text & notes 62-71 *supra*. A rather tenuous argument may be made that the accumulation of the land involved in *Bonelli* would qualify as gradual and imperceptible. If the dredging operation took place over a period of 6 months, for example, the exposure of a half-section of land would proceed at the rate of about 0.12 inches per minute. Arguably, this rate may qualify as imperceptible. The outcome, of course, should not depend on a matter as mechanical as this. *See* Beck, *supra* note 45 for a discussion of cases of natural accretions of large amounts of land which have occurred in months or even weeks. *See also* Esso Standard Oil Co. v. Jones,

load-by-load dumping of spoil dredged from the river bottom was, of course, easily perceptible, which would seem to enable the state to carry its burden of overcoming the presumption. An impasse in the application of the mechanical rules develops, however, since it is impossible to separate the spoil from the accretions and relictions over the physical area of the disputed land. No one can say with any measure of certainty that a certain cubic yard is attributable to reliction; this cubic yard to alluvion, or that to spoil.

Consideration of the theories behind the accretion doctrine supports awarding the new land to the riparian. By the theory of accession, the upland owner has a right to accreted lands similar to that of the owner of a tree to its fruit.[99] That some third party has "fertilized" the growth should be of no effect. Under the productivity concept, the upland owner is in a better position than the state to utilize the new land.[100] The compensation rationale reasons that since the upland is subject to loss by erosion, it should gain by accretion. A compensation theory might similarly be formulated for man-made or man-caused additions: since lands riparian to navigable water may suffer noncompensable losses and injuries[101] or be deprived of their riparian character altogether by federal or state exercise of the navigational servitude,[102] surfaced land should inure where it is not needed as an integral part of the navigational project.[103] The state, for instance, might show that, due to varying releases of water through Hoover Dam, the land disputed in *Bonelli* is needed to carry periodic over-flow of the river.[104] Or it might show that the land is needed for a dike or similar river-control project. Absent such a demonstration, however, the new land should vest in the upland owner to preserve his riparian status.

The riparian owner has no control over *natural* forces which might cause intervening lands between his land and the river and which, if not held by the riparian, would extinguish the riparian status of his land. The accretion doctrine guarantees maintenance of his riparian status by automatically awarding him the ownership of such intervening lands. Similarly, because of the federal and state navigational servitudes, the riparian has no control over the *governmental* forces which may cause such intervening lands. Where land cast up in the

233 La. 915, 98 So. 2d 236 (1957), *aff'd on rehearing*, 233 La. 940, 98 So. 2d 244 (1957).

99. See note 41 *supra*.

100. See text & note 42 *supra*.

101. See note 77 *supra*.

102. *Id.*

103. *See* Michaelson v. Silver Beach Imp. Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961).

104. *See* Ray v. State, 153 S.W.2d 660 (Tex. Civ. App. 1941). *See also* note 96 *supra*.

exercise of the servitude is not needed to further navigation, accretion theory should provide a disposition.

The High Water Mark

In clarifying the definition of "high water mark" in the supplemental opinion to *Bonelli*, the Supreme Court of Arizona held that "subsequent artificial control of the river could not deprive Arizona of property rights in the bed [of the Colorado River] which were constitutionally vested prior to the completion of the Hoover Dam in 1938" and that consequently the high water mark *as it existed in 1938* is the line of demarcation between the upland owner's property and the state-owned bed.[105] Although citing no authority in direct support of its holding, the court referred to the Submerged Lands Act[106] for the proposition that the state owns the beds beneath navigable waters to the high water mark as it existed in 1938. The Act is more logically construed, however, to support a result contrary to that reached in the *Bonelli* supplemental opinion.

The Act specifically adopts the concept of the changing river bed by declaring that the state holds title to lands submerged beneath nontidal navigable waters within their boundaries "as heretofore or hereafter modified by accretion, erosion, and reliction."[107] Presumably, when they enacted the Submerged Lands Act the members of Congress knew of the common law of accretion, including the case of *County of St. Clair v. Lovingston*,[108] decided by the Supreme Court of the United States in the 19th century. That case held that man-made obstructions and interferences in a navigable waterway have no effect on the operation of the doctrine of accretion, and that "whether the flow was affected by artificial means is immaterial" to the vesting of accretions in the riparian owner. Thus the Act may be construed simply to confirm existing case law regarding the beds of nontidal navigable waterways: the state holds the bed as a bed; the state loses title to lands made dry by accretion, while the riparian loses title to lands submerged by erosion, regardless of artificial or natural causes. Similarly, while quit-claiming federal interests in lands reclaimed from navigable waters,[109] the Act has no effect on private claims to such

105. 108 Ariz. —, —, 495 P.2d 1312, 1313-14 (1972).
106. 43 U.S.C. §§ 1301-1343 (1970).
107. *Id.* § 1301(a)(1).
108. 90 U.S. (23 Wall.) 46, 69 (1894).
109. 43 U.S.C. §§ 1301(a)(3), 1311 (1970), said to be a "saving clause providing that nothing in [the Act] shall affect such rights, if any, as may have been previously acquired under any law of the United States [in] lands subject to this resolution." S. REP. No. 133, 83d Cong., 1st Sess., pt. 1, at 13 (1953).

lands.[110] The Supreme Court of Arizona, therefore, may look to the Submerged Lands Act solely for the proposition that the state presumptively holds title to the beds of navigable waterways to the *current* high water mark. The Act leaves the individual state to decide whether reclamations are to be treated as accretions, rather than declaring that reclamations must remain in the state.

The *Bonelli* definition of the high water mark is as far-reaching as it is unique. The operation of Hoover Dam since 1938 has reduced and slowed the flow of the river. This undoubtedly facilitated alluvion deposition and reliction downstream. If the hypothesis is accepted that the width of the river has merely diminished while the middle thread of the river has remained geographically constant, the result of the holding that such accretions do not vest in the riparians is that the state owns a corridor of lands, extending from the dam to the Mexican border, intervening between the riparians and the river, thus leaving no private persons riparian to the Colorado River in Arizona. The inequity to the riparians is equally manifest as the effect on stability of title.

Alternatively, there are probably areas along the river which have been submerged by erosion since 1938. If the high water mark of 1938 is controlling, the state does not hold title to such lands—the private adjacent owner does. This, of course, is inconsistent with virtually unanimous case law.[111] It may be argued that the court has dealt with this contingency in their enigmatic statement that while 1938 was the date at which the boundary was set, "evidence of the river's condition thereafter may be illuminating."[112] If this is an attempt to provide that lands submerged since the operation of the dam still vest in the state, while at the same time denying the riparians accretions, the court is perverting the common law. There is no authority for such a position and there is certainly no reason in support of it. On the other hand, if the statement may be regarded as extraneous, there is little escape from the result that lands submerged after the beginning of operation of the dam do not vest in the state since, as the court reasons, "artificial control of the river could not divest" the upland owner of his property rights.[113]

The result of this interpretation of the court's definition of the high water mark is that the bed of the river is a mosaic, predom-

110. See text accompanying notes 32-36 *supra*. *See also* Arizona v. California, 381 U.S. 139, 177 (1965).
111. *See* text & notes 37-54 *supra*.
112. 108 Ariz. at —, 495 P.2d at 1314.
113. *Id.*

inantly state held but interspersed with privately-held parcels. Similarly, the lands abutting the river are held by the state in places where the 1938 high water mark extends higher than the current high water mark, while they are privately held in other places where the 1938 high water mark coincides with the current high water mark. This is, of course, inconsistent with the accretion doctrine's purpose of providing stability of status—the state should maintain proprietary control over the bed, while the riparian should remain riparian. The riparian should obtain the benefit of accretion and suffer the burden of erosion. In holding otherwise in the supplemental opinion, the Arizona court has misconstrued or distorted the common law, or has failed to articulate the underlying rationale for its decision.

The Effect on Riparian Rights in Arizona

The *Bonelli* decisions cast doubt upon the existence of vestigial riparian rights in Arizona. Though the riparian *usufructory* right was expressly abrogated by the state constitution and the doctrine of prior appropriation substituted in its stead,[114] both policy and legal reasons exist for confirming the retention of those riparian rights not essential to the efficient administration of the appropriation system. One such right which could easily have survived the adoption of the appropriation doctrine is the right of access to navigable waters.[115] If access is maintained, other riparian benefits such as fishery, recreation and the right of accretions should logically follow since they are dependent upon access.

Since Chief Justice Struckmeyer, writing for the *Bonelli* majority, failed to remark upon or consider the loss of riparian status of the plaintiff, it might be inferred that no such vestigial riparian rights are recognized by the court. It is hoped that no such implication was intended. Such a conclusion, however, is difficult to avoid; if the riparian status held any significance for the justices in the majority, its loss presumably would have been weighed against the interest of the state in retaining the exposed bed. In other words, the result may not have been different, but the manner of arriving at that result may have been.

Instead of weighing the competing interests, the court merely de-

114. ARIZ. CONST. art. 17, §§ 1, 2.

115. *E.g.*, Shepherd v. Coeur d'Alene Lumber Co., 16 Idaho 293, 101 P. 591 (1909); *cf.* Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909); State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945) (those riparian rights not conflicting with appropriation doctrine are in full force as part of the common law of New Mexico). *See also* Note, *Riparian Rights in Appropriation States*, 9 WYO. L.J. 130 (1955).

nied the plaintiff's claim to the reexposed land by blandly distinguishing the dredging operation from water-caused alluvion deposition and natural reliction. Though the inference of nonrecognition is possible, the court should speak directly to the issue of whether or not vestigial riparian rights are recognized in Arizona. The existence of such rights has at least one vocal friend on the court in Justice Lockwood.[116] Her lengthy dissenting opinion in *Bonelli* distinguished the riparian *use* right from other common law riparian rights and concluded that the latter survived the abrogation of the former.

The tenor of Arizona judiciary on such rights is difficult to ascertain. The riparian right to natural accretions has been upheld by the Arizona Court of Appeals,[117] and the doctrine of accretion has been applied by the Supreme Court of Arizona to confirm jurisdiction over a criminal act.[118] These decisions, however, provide little insight into the Arizona judicial view of the right of access. The court of appeals rested on the theories of compensation and boundary, while the high court merely cited the mechanical boundary rule.

The case of *Brasher v. Gibson*[119] at first impression seems to preclude any recognition of the right of access. There the court stated that no riparian rights were recognized at all in the state, and denied a right of access and use to a landowner who had become riparian to a *man-made* lake. The court, however, cited cases from *riparian* jurisdictions which hold the same result, thus relegating the pronouncement to dictum.

The ominous void in *Bonelli* should be filled by an express judicial affirmation of the riparian right of access to navigable waters. Statutes in derogation of the common law should be strictly construed.[120] It is inconceivable that in adopting the appropriation doctrine the Arizona constitutional convention sought to deny the common law right of a riparian in Yuma, for instance, to wharf out into the river to provide mooring for rivercraft. Since the section of the state constitution purporting to abolish riparian rights is contained in the water *use* article, it should be limited to the abolition of the riparian usufructory right only. The right of access is not inconsistent with the appropriation system.[121]

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116. State v. Bonelli Cattle Co., 107 Ariz. 465, 469-72, 489 P.2d 699, 703-06 (1971) (Lockwood, J., dissenting).
117. State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P.2d 352 (1967).
118. State v. Jacobs, 93 Ariz. 336, 380 P.2d 998 (1963).
119. 101 Ariz. 326, 419 P.2d 505 (1966).
120. Richardson v. Ainsa, 11 Ariz. 359, 95 P. 103 (1908).
121. *See* note 115 *supra; cf.* United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).

APPLICATION OF FEDERAL LAW

Since the *Bonelli* parcel is federally patented land, grounds may exist for invoking federal jurisdiction and law over the issues involved in that case. In *United States v. Washington*[122] the Ninth Circuit held that when title is in or derived from the federal government, the question of ownership of accretions is to be determined by federal law. That case dealt with accretions to federally held upland. State law denied any right to accretions, and the state claimed the new land. The court awarded the disputed land to the federal government as the owner of the upland.

A later case, *Hughes v. Washington*,[123] dealt with the same state law denying littoral owners any accretions. This upland had been federally patented to the plaintiff's predecessor-in-interest before Washington's statehood. The Supreme Court of the United States, citing *United States v. Washington* with approval, held that what rights are conveyed by, and

> the extent of ownership under a . . . federal grant [are] governed by federal law. This is as true whether doubt as to any boundary is based on a broad question as to the general definition of the shoreline *or on a particularized problem relating to the ownership of accretion.*[124] [Emphasis added.]

The disputed land was awarded to the upland owner by operation of the accretion doctrine. It is apparent then, that the issue as to the ownership of post-Hoover Dam accretions is a matter of federal law and that the *Bonelli* definition of the high water mark is inapplicable to the land disputed in that case, other federally patented lands, Indian lands, and federally held lands.[125]

The issue of ownership of reclamations, however, may or may not be a matter of federal law where federally held or federally granted lands are involved. It is possible that *Hughes* and *Washinton* could be limited to their facts so that federal law is applicable only to "natural" or water-borne additions to such lands. This limitation would leave the disposition of reclamations to the determination of state law.[126] The cases might easily be read, however, to include recla-

122. 294 F.2d 830 (9th Cir. 1961), *cert. denied*, 369 U.S. 817 (1962).
123. 389 U.S. 291 (1967).
124. *Id.* at 292.
125. *See* United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970), *aff'g* 279 F. Supp. 87 (D. Ariz. 1967); Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966).
126. *See* Barney v. City of Keokuk, 94 U.S. 324, 337 (1876):
> It is generally conceded that the riparian title attaches to subsequent ac-

mations as "streamlined accretions."[127] Since the *Bonelli* parcel is federally patented land, the rights inherent in the grant, including those regarding the addition of lands by "artificial means" and reclamation-created changes in the boundary between the upland and the water, could arguably be governed by federal law.[128]

Although the federal rule may not be readily ascertained, it is very possible that the federal courts would adopt the navigational purpose rule.[129] If this were not so, every time the federal government dredged the Colorado River adjacent to federal and Indian lands situated in Arizona, it would be cutting off riparian access of those lands. Though the federal courts might give weight to the Arizona decision, it is possible that they would reach a different result. Citing the federal and state power over navigation, the *Hughes* Court stated that although the right of access to water is "subject to considerable control by the neighboring owner of the tideland, . . . this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interests of the tideland owner."[130] This statement embodies the spirit of the navigational purpose rule. Since the upland owner is subject to losing his access to water and other riparian benefits by, and is therefore at the mercy of, federal or state exercise of navigation powers, when land upcast by artificial means is not needed for a navigational purpose, title should go to the upland by the doctrine of accretion.

ALTERNATIVE RESOLUTIONS

The *Bonelli* result on the reclamation issue will cause many stretches of land along the Colorado River to lose their riparian character. The state will gain a corridor of valuable riparian bottom-land

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cretions . . . effected by gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river . . . is a question which each state decides for itself.

That case, however, involved neither federally held upland nor federally granted upland. *See* Borax Consol. v. City of Los Angeles, 296 U.S. 10 (1935) (meaning of phrase "mean high tides" present in post-statehood federal grant determined under federal, not state law).

127. State v. Gill, 259 Ala. 177, 183, 66 So. 2d 141, 145 (1953); *see* text & notes 79-82 *supra*.

128. *Compare* Barney v. City of Keokuk, 94 U.S. 324 (1876), *with* Hughes v. Washington, 389 U.S. 291 (1967), *and* United States v. Washington, 294 F.2d 830 (9th Cir. 1961).

129. *See* text & notes 76-82 *supra*. *See also* 43 U.S.C. §§ 1301-1343, 1301(a)(3), 1311 (1970), amounting to a federal quit-claim of reclamations. Indian lands, however, are exempted from the effect of the act. *Id.* § 1313.

130. 389 U.S. at 294. *Cf.* Burns v. Forbes, 412 F.2d 997 (3d Cir. 1969) (dictum that reclamations caused by a third person having no connection with the upland owner inure to upland title).

exposed by the dredging operations of the Bureau of Reclamation at no expense to the state. On the other hand, had the result gone the other way, the riparians along the river in many cases would have been granted a bonus of large acreages of that same valuable land without any effort or expenditure on their part. Either result is arguably inequitable.

There are three alternatives which would better protect the riparians and simultaneously safeguard the state's interest in the reclaimed lands. One alternative, which could be judicially imposed, is to require the state to compensate the riparian for his loss of access to the waters. The right of access is a valuable property right deriving from the natural location of land.[131] The reclamation of state land intervening between the riparian and the new water mark in effect transfers this property right to the state land. That the state holds the technical fee to the soil under the river does not support such a transfer, for that soil itself was subject to the access easement in favor of the riparian land. Neither does the navigation servitude support the transfer since the improvement of navigation in no way requires it. Thus access is destroyed by ownership of the intervening land and is transferred to state land which previously had no appurtenant right of access. The state therefore could be required either to compensate the riparian for this loss or to renounce its interest in the new land and allow the riparian to take it.[132]

A second alternative, which could also be judicially imposed, is to allow a right of easement across the intervening state land. Such a result was reached in *Commercial Waterway District No. 1 v. Permanente Cement Co.*, where the Washington court allowed a littoral right of easement across the intervening bed cast up by channel dredging carried out by the state's grantee.[133]

A third alternative is one which will protect all the interest involved in a more equitable manner. The legislature could provide that the riparians be given the right to purchase the exposed river-bot-

131. *E.g.*, Norwalk v. Podmore, 86 Conn. 658, 86 A. 582 (1913); Lyon v. Fishmonger's Co., 1 App. Cas. 662 (H.L. 1876).

132. *See*, Note, *Access and Reclamation*, 32 YALE L.J. 1 (1922). *See also* Marshall v. Ulleswater Steam Navigation Co., L.R. 7 Q.B. 166 (1871).

133. 61 Wash. 2d 509, 379 P.2d 178 (1963). *See also* Melbourne Harbour Trust Comm'rs v. Colonial Sugar Refining Co. Ltd., [1925] Vict. L.R. 384, 438-39, 462-64 (Austl. 1925). The easement, while technically preserving access, would cause problems for the riparians as well as the state. For example, a private person may have built a hotel along the river only to have the federal government dredge the river with the resultant intervening reclamation between the riparian and the river. The state might use the parcel for an incompatible project, and the easement would then mean very little.

tom which interposes itself between the upland and the new channel. A reasonable price could be set which should be the fair market value of the land less the value attributable to its proximity to the river, since the original parcel was riparian prior to the dredging. If a particular riparian values the right of access, he should be permitted to purchase as much of the frontage as he desires up to the limit of his original shoreline. A reasonable time limit could be set within which to notify the state of an intent to purchase. Failure to exercise the option within the specified time period would confirm title in the state.

The proceeds from such sales could be deposited in a fund established to promote the broad purposes of the public trust from which the lands came—namely the promotion of public use and enjoyment of navigable waters. This promotion might take the form of state navigational improvement, state parks along the river where the state owns the upland, docks, marinas, and other facilities. This "transformation" of trust property no longer essential to protect the rights of navigation and public enjoyment, would be consistent with the purpose of the formation of the trust.[134] Such a solution would protect all the interests, to greater or lesser degrees, instead of causing a boon on the one hand and an irretrievable loss on the other.

CONCLUSION

The problems faced by the *Bonelli* court were formidable and deserved more written explication than they received. The holding regarding post-Hoover Dam accretions and the definition of the high water mark must be reconsidered either by the Supreme Court of Arizona or, in the case of lands vested in or *derived from* the federal government, by the federal courts. Allowing the 1938 high water mark to delineate the boundary between the state-owned bed and the uplands does violence to the accretion doctrine and hundreds of years of common law. Practically, the decision will cause confusion and hardship among landholders within Arizona along the Colorado River. Because the lands involved in *Bonelli* had previously been held by the upland owner and were then lost to the river by erosion, re-exposure of the lost acreage should result in an award to the upland owner by the doctrine of re-emergence. The cause of the re-exposure should be of no effect.

The broader holding regarding the reclamation issue failed to consider the certain loss of riparian status due to forces wholly be-

134. *See generally* Sax, *supra* note 19.

yond the control of the upland owner. This omission perhaps forbodes the untimely demise of the riparian right of access to navigable waters in Arizona. That such a right exists should be judicially affirmed and its loss weighed against other considerations presented in the reclamation issue involved in *Bonelli*. Once this vestigial riparian right is established, traditional accretion theory, as supplemented by the navigational purpose rule, provides ample support for an award of reclaimed land to the upland. Such a result may be reached by federal courts in dealing with lands in or derived from the federal government.

Finally, in the absence of judicial action a solution should be sought that will protect all of the interested parties involved in the reclamation problem. It is proposed that by giving the riparian the right to purchase intervening reclamations and by setting up a fund derived from such sales to promote the purpose of public use and enjoyment of navigable waters, the legislature could effect a more equitable result than the one fashioned by the court.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

vs.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

GARY K. NELSON
THE ATTORNEY GENERAL OF ARIZONA

By Dale R. Shumway
Special Assistant
64 East Broadway
Tempe, Arizona 85282
Attorney for Respondents

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Respondents, State of Arizona and its State Land Department and State Land Commissioner, by and through the Attorney General of Arizona pray that a Writ of Certiorari issue to review the judgments and decisions

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-397

ROSELLE CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

vs.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Respondents, State of Arizona and its State Land Department and State Land Commissioner, by and through the Attorney General of Arizona, pray that a Writ of Certiorari issue to review the judgments and decisions

of the Supreme Court of Arizona, entered in the above-entitled case on October 4, 1971 and April 13, 1972.

CITATION TO OPINIONS BELOW

The opinions of the Supreme Court of Arizona are reported at 489 P.2d 699 (1971) and 495 P.2d 1312 (1972). These decisions have been filed with the Court by petitioner as Appendix A and B to their petition. The original decision of the Supreme Court of Arizona was filed October 4, 1971. Thereafter a motion for rehearing was filed on April 13, 1972. The Supreme Court of Arizona denied the motion for rehearing and filed its final decision. On joint application of petitioners and respondent, Mr. Justice Douglas, by order dated June (sic) 12, 1972, extended the time for filing a petition for Writ of Certiorari to and including September 9, 1972.

The jurisdiction of this Court is

of the Supreme Court of Arizona, entered in the above-entitled case on October 4, 1971 and April 13, 1972.

CITATION TO OPINIONS BELOW

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The jurisdiction of this Court is

invoked under 28 U.S.C. 1257(3).

STATEMENT

The western boundary of the State of Arizona is formed by the Colorado River. The river, being an alluvial river has during times past changed its course many times, leaving in question the location of the border between Arizona and the states of Nevada and California and leaving serious title questions to lands lying adjacent to the river. The location of the boundary was settled by contract between Arizona and the states of Nevada and California. 80 U.S. Stat. 340 and 75 U.S. Stat. 93. The questions of title to the lands however have never been settled.

Several years ago, the legislative State of Arizona recognizing the serious title problems affecting lands adjacent to the Colorado River, authorized the expenditure of considerable sums of money to attempt

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Several years ago, the legislative State of Arizona recognizing the serious title problems affecting lands adjacent to the Colorado River, authorized the expenditure of considerable sums of money to attempt

to solve these title problems. Senate Bill 190, 1st Regular Session of the 26th Legislature of the State of Arizona. Succeeding legislatures have continued to appropriate money for expenses of the Attorney General incurred for litigation of disputes involving title to land beneath and along the Colorado River.

The statement, beginning at Page 12 of the Petition for a Writ of Certiorari, clearly sets forth the title problem presented in the instant case and the case of United States v Claridge, 279 F. Supp 87, aff'd 9th Cir., 416 F.2d 933. These two cases have resulted in a lack of uniformity in Arizona's attempt to determine the law regarding title to land adjacent to and beneath the Colorado River.

REASONS FOR GRANTING THE WRIT

A. Conflict of Authorities

1. The decision of the Court below

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REASONS FOR GRANTING THE WRIT

A. Conflict of Authorities

1. The decision of the Court below

is in conflict with a recent Federal Court decision involving identical lands.

The essence of the decision in the instant case is that the "ordinary high water mark" and thus the boundary of the state's title to the bed of the river is the mark to which the water formerly rose at the time of or in the season of ordinary high water. This line with reference to the lands involved in the instant case is clearly shown on Page 2d of Appendix D attached to the petition. The "high water mark" established in Bonelli recognizes the natural flow of the Colorado River as it existed prior to the closure of Hoover Dam. Since that time the river has been to a great degree stabilized resulting in no usual high flow stages or seasonal ordinary high water.

2. The holding of the Court below is extremely different from the holding of the Court in United States v Claridge, 279 F. Supp

is in conflict with a recent federal Court decision involving identical lands.

The essence of the decision in the instant case is that the "ordinary high water mark" and thus the boundary of the state's title to the bed of the river is the mark to which the water formerly rose at the time of or in the season of ordinary high water. This line with reference to the lands involved in the instant case is clearly shown on Page 24 of Appendix D attached to the petition. The "high water mark" established in Bonelli recognizes the natural flow of the Colorado River as it existed prior to the closure of Hoover Dam. Since that time the river has been to a great degree stabilized resulting in no usual high flow, stages or seasonal ordinary high water.

2. The holding of the Court below is extremely different from the holding of the Court in United States v Claridge, 279 F. Supp

87, aff'd 9th Cir., 416 F.2d 933 where the identical questions involving lands adjacent to the Colorado River were presented for decision and the opposite result reached. The Court there held that the "ordinary high water mark" of the Colorado River is the point to which the waters usually reach today. That decision disregarded the changes in the "natural river" as it existed prior to the closure of Hoover Dam and the "stabilized river" as it exists today.

B. Importance of the Issue

The questions presented by the Petition for Writ of Certiorari are of great importance in stabilizing land title along the Colorado River. There is a great difference between the lands encompassed within the "high water mark" as defined in Bonelli by the Arizona Supreme Court and in Claridge by the 9th Circuit Court of Appeals. Page 2d of Appendix D shows the two "high water marks".

B. Importance of the Issue

The questions presented by the Petition for Writ of Certiorari are of great importance in establishing land title along the Colorado River. There is a great difference between the lands encompassed within the "high water mark" as defined in Donnelly by the Arizona Supreme Court and in Claridge by the 9th Circuit Court of Appeals. Page 24 of Appendix D shows the two "high water marks".

At the north end of the subject land these marks are nearly a half mile apart while at the southerly end they are nearly one mile apart. This difference varies for other points on the Colorado River as the size and width of the river flood plane varies.

Throughout the length of the Colorado River along the western boundary of Arizona, thousands of acres of land are encompassed between these two "high water marks" and title questions will continue to arise regarding which rule should apply in determining title to these lands.

The Attorney General of Arizona has met with private parties who claim title to lands adjacent to the Colorado River and with members of the legislature of Arizona in an attempt to solve the problems demonstrated by the Claridge and Bonelli cases. The Attorney General has advised the legislature that legislation in Arizona will not solve

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the conflict which exists because of these decisions.

CONCLUSION

The State of Arizona has made an exceptionally earnest effort to bring about a just solution to title problems along the Colorado River. They have entered into litigation with numerous parties, hoping that uniform decisions could be obtained to settle title questions. Under the decision of the Court below when compared with the decision in Claridge we see differences which can only lead to future litigation between private parties, between private parties and the State of Arizona and between the State of Arizona, private parties and the United States.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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The State of Arizona has made an exceptionally earnest effort to bring about a just solution to title problems along the Colorado River. They have entered into litigation with numerous parties, hoping that uniform decisions could be obtained to settle title questions. Under the decision of the Court below when compared with the decision in Claridge we see differences which can only lead to future litigation between private parties, between private parties and the State of Arizona and between the State of Arizona, private parties and the United States.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GARY K. NELSON
THE ATTORNEY GENERAL OF ARIZONA

By DALE R. SHUMWAY
Special Assistant Attorney General
64 East Broadway
Tempe, Arizona 85282
Attorney for Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
KENT FRIZZELL,
Assistant Attorney General,
EDMUND B. CLARK,
CARL STRASS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the invitation of this Court on November 20, 1972, requesting the Solicitor General to express the view of the United States in this case.

1. The Bonelli Cattle Company and others instituted this action in the Superior Court of Mohave County, Arizona, to quiet title to a parcel of land along a rechannelized portion of the Colorado River on the Arizona side. Because of river stabilization due to construction of Hoover Dam, and the subsequent rechannelization resulting from dredging operations by the federal government in 1959 (Pet. 14-15), the land in question, which had previously formed a portion of

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the natural bed of the Colorado River, was made permanently dry. Petitioners claim title under a deed acquired in August 1955 from a grantor whose title traced to a federal patent permit issued by the United States on November 5, 1910, to Santa Fe Pacific Railroad (Pet. App. 3a). Their position is that the portion of the river bed which, after rechannelization, was not used for the flow of water reverted to the previous owners. The State of Arizona, on the other hand, contended that the recently dried land belongs to the State as part of the original bed of a navigable river, and that the sudden change in the flow of water due to federal dredging operations did not divest the State of its title.[1]

The Superior Court entered judgment quieting title in Bonelli Cattle Company, and the Arizona Court of Appeals affirmed (11 Ariz. App. 412, 464 P.2d 999). On appeal to the Arizona Supreme Court, the judgment was reversed (Pet. App. 1a–12a), one judge dissenting (Pet. App. 12a–36a). 107 Ariz. 465, 489 P.2d 699. The majority found that the dried land lay between what was the ordinary high water mark of the river in this area just prior to its rechannelization and what is presently the ordinary high water mark of the river as rechannelized. (The rechannelization did not change the stream thread, but only narrowed the river

[1] As the Arizona Supreme Court stated in its opinion on rehearing (Pet. App. 3b): "The title to all lands within the beds of navigable waters including all reclaimed lands which formerly were beneath navigable waters up to the ordinary high water mark was quit claimed in 1953 to the states by the Submerged Lands Act of Congress, 67 Stat. 29, 43 U.S.C.A. § 1301 *et seq.*"

by increasing its depth so as to reduce the loss of water through evaporation.) Since the change in the flow of water was sudden and directly attributable to the dredging operations, the majority concluded that the State retained title to all the land—whether wet or dry—within the navigable river bed as measured by the original ordinary high water marks.

2. Apparently the Arizona Supreme Court resolved the title dispute to the riparian lands involved here by looking to the law of Arizona. To the extent that its decision rests on an interpretation of state law, it is, of course, unassailable in this Court.

It is our view that the controversy in this case should have been decided under principles of federal, rather than state, law, since the land in question had been conveyed under a federal patent permit to Bonelli Cattle Company's predecessor-in-interest prior to Arizona's statehood. See *Hughes* v. *Washington,* 389 U.S. 290. We believe however, that the Arizona Supreme Court reached the correct result in this case as a matter of federal law.

It is well settled under federal law that riparian land titles and titles to river beds are affected by gradual changes in the flow of water due to accretion or erosion. *Hughes* v. *Washington, supra,* 389 U.S. at 293. Where there is a gradual and imperceptible accumulation of land on a navigable river bank, whether by way of alluvion or dereliction,[2] the federal

[2] Alluvion is land added by the deposit of silt and debris out of the water. Derelicted or relicted land is land added by the recession of the water leaving a portion of the bed dry. See Lundquist, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 Arizona L. Rev. 315, 321 (1972). The Lundquist article is reproduced at Pet. App. I.

courts have recognized the riparian owner as the beneficiary. He acquires title to such accreted lands, even if the accretion results from man-made, rather than natural causes. See *St. Louis* v. *Rutz*, 138 U.S. 226, 247–248; *United States* v. *Claridge*, 416 F. 2d 933 (C.A. 9), certiorari denied, 397 U.S. 961. But the federal law is otherwise where a change in the water flow is sudden and easily perceived. In such circumstances, the dried land that had formerly been part of the river bed does not become the property of the riparian owner; title remains with the State. See, *e.g.*, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 624; *Nebraska* v. *Iowa*, 143 U.S. 359, 360–369; *St. Louis* v. *Rutz*, *supra*, 138 U.S. at 245.

The present case involves a sudden change in the location of the river as a result of dredging operations by the federal government. Accordingly, title to the dried portion of the river bed would, under federal law, remain with the State of Arizona. Unlike *United States* v. *Claridge*, 279 F. Supp. 87 (D. Ariz.), affirmed, 416 F. 2d 933 (C.A. 9) (Pet. App. 1c–5c), this is not a situation where the change in the water flow "resulted from gradual erosion and not from avulsion" (Pet. App. 4c). The question in *Claridge* was the quite distinct one of whether "*resulting accretion* passes to the United States as riparian owner" (*ibid.*; emphasis supplied). The court there gave an affirmative response because it determined that the government project involved (Hoover Dam) "did not result in avulsive changes and it was not constructed for the purpose of reducing riverbed holdings" (*ibid.*).

We believe the result reached in *Claridge* was correct and does not conflict with the present case. The facts here show that rechannelization of the Colorado River in this area caused a sudden drying-up of a portion of the river bed—*i.e.*, an avulsive change. In such circumstances, federal law—consistent with the decision of the Arizona Supreme Court under state law—requires that title be quieted in the State.

Accordingly, while it is our view that the court below erred in applying state rather than federal law, that error was immaterial in this case. The petition for a writ of certiorari therefore should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

EDMUND B. CLARK,
CARL STRASS,
Attorneys.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

v.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents and Joint Petitioners.

Brief of Santa Fe Pacific Railroad Company as Amicus Curiae

PHILIP E. VON AMMON
1700 First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
Attorney for Amicus Curiae

FENNEMORE, CRAIG, VON AMMON & UDALL
Of Counsel

BORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

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INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of Santa Fe Pacific Railroad Company with the consent of all the parties pursuant to Rule 42(2) of this Court. The consents are on file with the Clerk.

Santa Fe Pacific Railroad Company acquired some 41,711.22 acres of land by patent from the United States of America on November 5, 1910 pursuant to the Land Grant

Act of July 27, 1866. Thereafter, both prior and subsequent to the enactment of the Enabling Act which granted statehood to the State of Arizona, Santa Fe sold substantially all of the acreage and conveyed it by warranty deed to private owners, one of whom was petitioner's predecessor in title.

The decision of the Supreme Court of Arizona appears to hold that under the "equal footing" doctrine the Enabling Act may have vested in the State of Arizona title to lands already conveyed to Santa Fe Pacific prior to statehood. The potential exposure of Santa Fe Pacific upon its warranties could be substantial.

ARGUMENT

The sole question to which this brief is addressed is the effect of the Enabling Act granting statehood to Arizona on the title of a prior patentee from the United States of lands along the Colorado River. The question appears to be one of first impression and may involve serious due process implications.

While the record does not disclose the movement of the river between the meander survey of 1902-03 and the completion of Hoover Dam in the mid-1930's, the Arizona Court's definition of "high water mark" could very well place the limits of the navigable stream both in 1910 (the date of Santa Fe's patent) and in 1912 (Arizona's statehood) at points which would embrace all or part of the lands patented to Santa Fe.

The Court's Supplemental Opinion, 495 P.2d 1312, states:

> "The title to all lands within the beds of navigable waters including all reclaimed lands which formerly were beneath navigable waters up to the ordinary high water mark was quitclaimed in 1953 to the states by the Submerged Lands Act of Congress, 67 Stat. 29, 43 U.S.C.A. § 1301 et seq."

The Submerged Lands Act has never been regarded as creating new rights in the beds of navigable streams. The Act is merely confirmatory of rights previously created. See the extensive committee reports set out in 1953 U.S. Code Cong. & Adm. News, pp. 1385-1640.

The opinion continues:

> "Beyond argument, title to and ownership of the lands beneath the Colorado River is in the State of Arizona from the Nevada boundary up to the ordinary high water mark in the natural channel as it existed prior to the taming of the river in 1938 by the completion of the Hoover Dam and the subsequent lowering of the channel by dredging."

Unless this holding is carefully limited, it is susceptible of the interpretation that the State of Arizona owns all the lands over which the River may have flowed naturally from, at least, February 2, 1848, the date of the Treaty of Guadalupe Hidalgo, 9 U.S. Stat. 922, which established the boundary between the United States and Mexico.

What the Arizona court's pronouncement fails to recognize is that, whatever the extent of Arizona's ownership, it did not vest until the state was admitted to the Union. In 1910, when the federal Land Grant patent issued to Santa Fe, the United States owned the land. Title to Santa Fe's land could not thereafter be vested in another by the United States, whether by patent to a private citizen or by admission of Arizona into the Union.

In *Hughes v. State of Washington*, 389 U.S. 290 (1967) this Court had before it the issue whether state or federal law controlled the resolution of a dispute between the State of Washington and a private owner of ocean-front land over tideland accretions. The predecessor in title of the private owner acquired his land by conveyance from the United States prior to Washington's statehood. The Court said:

> "Prior to 1889 all land in what is now the State of Washington was owned by the United States *except land that had been conveyed to private parties.*" 389 U.S. at page 291 (Emphasis supplied)

Washington's Attorney General did not contend that the Enabling Act or the Submerged Lands Act vested in the State title to any part of the land previously conveyed by the United States to the private owner.

The sweeping language of *Bonelli* purports to be based upon this Court's early decisions in *Pollard v. Hagan*, 15 U.S. (3 How.) 391 (1845) and *Goodtitle v. Kibbe*, 18 U.S. (9 How.) 228 (1850). Both cases involved patents from the United States to private owners *after* Alabama was admitted to statehood. The evidence disclosed that the waters of the Mobile River had covered the disputed land at ordinary high water from time to time from statehood to a date prior to the patents to the private owners. Since title to the ordinary high water mark vested in Alabama at statehood the subsequent patents were held to be void.

There is no basis in reason to assume that the result in either of these cases would have been the same if the patents had issued *prior* to statehood. Indeed, Chief Justice Taney, in *Goodlittle*, said:

> "Undoubtedly, Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State. But this was not done." 18 U.S. at page 229.

And the digest of the holding in *Pollard*, prepared by Mr. Justice Curtis, is as follows:

> "The State of Alabama, when admitted to the Union, became entitled to the soil under the navigable waters within the limits of the State, *not previously granted.*" 15 U.S. at page 666 (Emphasis supplied)

To the extent that the Arizona Supreme Court's decision in *Bonelli* purports to confirm in the State of Arizona *as of statehood* title to submerged lands previously conveyed to Santa Fe it constitutes a taking without just compensation in violation of the Fourteenth Amendment.

CONCLUSION

We urge the Court to clarify the rights of patentees prior to statehood and to limit the interest of the State of Arizona in the bed of the Colorado to lands not previously patented to others.

Respectfully submitted,

PHILIP E. VON AMMON
Attorney for Amicus Curiae

FENNEMORE, CRAIG, VON AMMON & UDALL
Of Counsel

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Brief for the Petitioners

ELMER C. COKER
Luhrs-Central Building
Phoenix, Arizona 85004

LEONARD C. LANGFORD
Mohave County Attorney
Kingman, Arizona 86401

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioners,

v.

The State of Arizona, The State Land Department, a department of the State of Arizona; Andrew L. Bettwy, State Land Commissioner of the State of Arizona,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Brief for the Petitioners

OPINIONS BELOW

The trial court's judgment quieting title against the State of Arizona and its State Land Department to the lands involved in this litigation situate along the Colorado River on the Arizona side of the river in Bonelli was entered by the Mohave County Superior Court of Arizona July 17, 1967, and certified copies thereof were recorded July 28, 1967, in Book 110 of Dockets, pages 228-232, records of

Mohave County, Arizona, and August 21, 1967, Instrument No. 656353, Official Record Book No. 817, records of Clark County, Nevada (App. 19).

The decision of the Court of Appeals of Arizona, Division 1, Department A, decided February 16, 1970, on an appeal by the State of Arizona and its State Land Department from the Mohave County Superior Court judgment affirmed the judgment of the trial court (App. 25) and is reported at 11 Ariz. App. 412, 464 P. 2d 999.

The Supreme Court of Arizona rendered two decisions. The first decision of October 4, 1971, was on review on petition of the State of Arizona of the aforesaid decision of the Court of Appeals of Arizona which reversed the judgment of the trial court and vacated the opinion of the Court of Appeals (Pet. App. A) and is reported at 107 Ariz. 465, 489 P. 2d 699. Upon timely motion for rehearing by Bonelli, in which proceeding several amici curiae briefs were filed including the County of Mohave supporting the motion for rehearing, the Supreme Court of Arizona on April 13, 1972, denied the motion for rehearing (App. 60) and supplemented its previous decision (Pet. App. B) reported at 108 Ariz. 258, 495 P. 2d 1312.

In both Supreme Court decisions Justice Lockwood dissented and filed an opinion in both decisions (Pet. App. A and B).

JURISDICTION

The final decision of the Arizona Supreme Court was filed April 13, 1972, on which date the Arizona Supreme Court denied Bonelli's motion for rehearing (App. 60). On joint application of petitioners and respondents, Mr. Justice Douglas by order dated June (*sic*) 12, 1972, extended the time for filing a petition for a writ of certiorari to and including September 9, 1972. The petition was filed September 8, 1972, and the petition for writ of certiorari was

granted January 22, 1973 (App. 65) after the Court had requested the Solicitor General to express the view of the United States in this case. In the Memorandum for the United States as Amicus Curiae the Solicitor General recommended the Court deny certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C. (1257 (3)).

QUESTIONS PRESENTED

The questions presented herein are a result of a direct conflict of the decisions of the Arizona Supreme Court (Pet. App. A and B) with the decision in *United States v. Claridge,* reported in 279 F. Supp. 87, affirmed by the United States Court of Appeals for the Ninth Circuit reported in 416 F. 2d 933 (cert. denied March 2, 1970, 397 U. S. 961, 25 L. Ed. 2d 253, 90 S. Ct. 994) (Pet. App. C). These decisions involved ownership and changes of ownership of lands along the Colorado River by virtue of its past natural movements and later changes of the channel as a result of the construction of Hoover Dam and the rechannelization of the Colorado River by the United States under the Boulder Canyon Project Act passed by Congress in 1928 (43 U. S. C. 617 et seq.). While the *Claridge* decision did not involve an area where rechannelization had occurred, the difference between the high water mark and the bed of the Colorado River as fixed by *Claridge* and as fixed by the Arizona Supreme Court decisions as they affect the Bonelli land is clearly shown on the diagram attached to the petition (Pet. App. D) and for convenience of the Court made a part of this brief (page 54). This is a composite of Judge Cameron's sketches appearing in the Court of Appeals decision (pp. 1000, 1001, 1002, 464 P. 2d 999; App. 29, 30, 31). Reference to this plat hereafter for brevity will be to the "composite plat".

1. Whether the ordinary high water mark and bed of a navigable river is established by and includes all of the area below the line created by the water during the usual high flow stage of the river's annual cycle.

2. Whether changes in the flow pattern of a navigable river caused by the construction of dams and rechannelization of the stream bed by the United States changes or alters the ordinary high water mark for purposes of changing or altering the ownership of the exposed lands resulting from the construction of such works.

3. Whether Federal or State law controls the ownership of land gained or lost by accretion on property conveyed by the United States prior to statehood.

4. Whether the decisions of the Arizona Supreme Court affect title to Federal and Indian lands as well as private lands bordering the Colorado River.

5. Whether the latter decision of the Arizona Supreme Court dated April 13, 1972, misconstrues or misinterprets the Submerged Lands Act of Congress as a grant by Congress to the States of lands formerly beneath navigable waters up to the ordinary high water mark without recognizing that said Act specifically exempts from the effect thereof any lands to which title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person (43 U. S. C. 1301 (f)).

6. Whether the respective decisions of the Arizona Supreme Court constitute a taking of property by the State of Arizona without compensation having been made therefor in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Article 2, Section 17, Arizona Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Submerged Lands Act of Congress enacted in 1953, 43 U. S. C. 1301 et seq.

The Act of Congress of June 17, 1902, 32 Stat. 388, and the unpublished Reclamation Withdrawal Order of January 13, 1903, issued pursuant thereto, a certified copy of the entire Order having been filed separately with the Clerk and pertinent parts thereof being set forth on page 34 of the Petition.

The Boulder Canyon Project Act enacted in 1928, 43 U. S. C. 617 et seq.

The constitutional and ordinance provisions involved are:

The Fifth and Fourteenth Amendments to the Constitution of the United States.

The Enabling Act of Arizona, Section 20, Second.

Article 2, § 17, Arizona Constitution, and Section Fourth, Article XX, of the Arizona Constitution.

The following are the pertinent parts of the Submerged Lands Act of Congress enacted in 1953, C. 65, Title I, § 2, 67 Stat. 29, now appears as 43 U. S. C. Section 1301 and provides in pertinent part:

"§ 1301. *Definitions*

"When used in this chapter—

"(a) The term 'lands beneath navigable waters' means —

"(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

• • • • •

"(f) The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;".

C. 65, Title II, § 3, 67 Stat. 30, now appears as 43 U. S. C. Section 1311 and provides in pertinent part:

"§ 1311. *Rights of the States—Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use*

"(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;".

C. 65, Title II, § 5, 67 Stat. 32, now appears as 43 U. S. C. Section 1313 and provides in pertinent part:

"§ 1313. *Exceptions from confirmation and establishment of States' title, power and rights*

"There is expected from the operation of section 1311 of this title—

"(a) * * * all lands expressly retained by or ceded to the United States when the State entered the Union * * *".

The Boulder Canyon Project Act was enacted by Congress December 21, 1928. C. 42 § 1, 45 Stat. 1057, now appears as 43 U. S. C. Section 617 and the pertinent part provides:

> "§ 617. *Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain*
>
> "For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States * * * the Secretary of the Interior * * * is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir * * * and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam * * *".

The pertinent parts of the Fifth and Fourteenth Amendments to the Constitution of the United States are:

> "Amendment V. No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."
>
> "Amendment XIV. Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property, without due process of law; * * *."

The following is the pertinent part of Article 2, Section 17, Constitution of Arizona:

> "Section 17. * * * No private property shall be taken or damaged for public or private use without just

compensation having first been made, or paid into court for the owner * * * ."

The pertinent part of Section 20, Second, of the Act of June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579, which enabled the people of the Territory of Arizona to form a constitution and state government is:

> "Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; * * * ".

and the pertinent part of the Ordinance provided by the Arizona Constitution, Article XX, Section Fourth, is:

> "Fourth. *Public lands; Indian lands*
>
> "Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

STATEMENT

History of the Case

On April 16, 1962, Bonelli Cattle Company filed an action in the Superior Court of Mohave County, Arizona, against the State of Arizona, its State Land Department and the State Land Commissioner to quiet title to the lands involved in this litigation situate along the Colorado River on the Arizona side of the river (App. 3). The action was submitted to the court on an agreed statement of facts (App. 6). On July 17, 1967, the court entered its judgment and decree quieting title to the subject lands in favor of the plaintiff Bonelli and against the defendants the State of Arizona, its State Land Department and State Land Commissioner (App. 19). From this decision the defendants appealed to the Arizona Supreme Court (App. 23), which court denied the direct appeal to it and ordered the appeal transferred to the Court of Appeals of Arizona, Division 1 (App. 24). The Court of Appeals on February 16, 1970, affirmed the judgment and decree of the Superior Court (App. 25). Upon application of defendants the Arizona Supreme Court granted review and by its decisions of October 4, 1971, and April 13, 1972, reversed the judgment of the trial court and vacated the decision of the Court of Appeals (Pet. App. A and B).

By said decisions the Arizona Supreme Court in effect held that the State of Arizona had acquired title to the Bonelli land by virtue of the fact that the Colorado River had moved in an eastward direction in a slow and imperceptible manner during which time the State of Arizona acquired title to the land and that the channelization of the Colorado River confining its flow to a part of the old bed did not cause a loss of the State's ownership.

In its first decision (Pet. App. A), the Arizona Supreme Court established the State's ownership to the land once covered by the Colorado River to the *high water mark,* which covered all of the east half of the Bonelli land except a small portion of the southeast corner thereof similar to a line established by Claridge (Pet. App. C), *supra.*

Upon timely petition for rehearing by Bonelli and after extensive briefs had been filed by Bonelli, the Attorney General of Arizona and eight amici curiae (App. 58), including the County Attorney of Mohave County although he is not named in the reported decision (Pet. App. B), the Supreme Court of Arizona on April 13, 1972, denied Bonelli's petition for rehearing (App. 60) and by supplementing its first decision (Pet. App. B) once again held that the State's title extended to the *high water mark,* but modified its first decision by holding that the State's title extended to the *high water mark* as it existed prior to the closing of the gates at Hoover Dam in 1938 (*sic*), although the gates were actually closed in 1935 (see Claridge, 279 F. Supp. 90).

This decision specifically refused to follow the rule in *United States v. Claridge,* supra (Pet. App. C), which establishes a different *"high water mark",* the Arizona Supreme Court stating: "It should be made clear that Arizona's title as against private persons is in no way controlled by the opinion in United States v. Claridge" (495 P. 2d 1314; Pet. App. B, p. 6b).

The conflict between the two decisions of the Arizona Supreme Court and the *Claridge* decision as to what constitutes the "high water mark" is shown on the "composite plat" (p. 54 this brief). It will be noted that the line established by the Arizona Supreme Court completely wipes out all of Bonelli's title and in addition extends the state ownership in the immediate vicinity of the Bonelli land

to portions of Section 32 (possibly state land), portions of Section 35 (fee land), Township 20 North, Range 22 West, and Sections 2 and 10 (public land administered by the Bureau of Land Management) and Section 11 (fee land granted to Santa Fe by the same patent from the United States that covered the Bonelli land), Township 19 North, Range 22 West, which lands lie to the north, east and south of the Bonelli lands and over a large area of the Fort Mohave Indian Reservation to the south in unsurveyed Township 19 North, Range 22 West. (See Davis Dam Quadrangle, Exhibit J and 1960 Mosaic Aerial Survey Photo, Exhibit D to the agreed statement of facts (App. 6) not a part of the appendix but a part of the record before this Court; "composite plat", p. 54 this brief; The Lower Colorado River Land Use Plan—a Report of the Lower Colorado River Land Use Advisory Committee—United States Department of the Interior, January 1964, on file with the Clerk of this Court and maps enclosed therein).

History of the Colorado River

The Colorado River was discovered in 1540 by Francisco Coronado. This was one year before the Mississippi River was discovered by Hernando de Soto (1972 World Almanac, Memorable Dates 1534-1638, p. 796, published by Newspaper Enterprise Association, Inc.).

The Colorado River was declared to be a navigable stream by this Court in *Arizona v. California*, 283 U. S. 423, 75 L. Ed. 1154, 51 S. Ct. 522 (1930). The Colorado River re-emerges from Lake Mead through Hoover Dam and winds its way over 500 miles to the Gulf of California, forming the western boundary of the State of Arizona. In certain areas along the River, the boundary between Arizona and the States of California and Nevada is set by

agreement; thus the middle thread of the River may or may not coincide with the actual boundary. In Arizona the River's course is bordered by the Counties of Mohave and Yuma.

The Bonelli land was originally surveyed in 1905 and 1906 and the official plat of survey was approved by the Surveyor General of the United States Department of the Interior June 29, 1906 (App. 15). At that time the Colorado River was entirely to the west of the Bonelli land and did not in any way encroach upon said land. Pursuant to the Act of Congress approved July 27, 1866, 14 Stat. 292, the subject land together with other lands was conveyed in accordance with the official plat of survey by patent issued by the United States on November 5, 1910, to The Atlantic and Pacific Railroad Company, predecessor in interest to Santa Fe Pacific Railroad Company (App. 16).

The exhibits attached to the agreed statement of facts (App. 6, not a part of the record as they could not be reproduced in printing) show the flood-plain area of the Colorado River between the 500-foot contour line on the Arizona side and the 500-foot contour line on the Nevada side (particular reference being made to the 1950 Davis Dam Quadrangle, Exhibit J). This area shown on the Quadrangle covers a distance of some four to five miles. The present channel through Section 3 (the Bonelli land) is approximately one mile to a mile and a half from the old Arizona-Nevada line which, according to maps at the time of the adoption of the Arizona Constitution in 1910 was the center of the Colorado River (see Sec. 1, Art. I, Constitution of Arizona).

History shows that since the original survey, the conveyance of the Bonelli land by the United States and the admission of Arizona to the Union on February 14, 1912,

the movement of the Colorado River has been from west to east meandering aimlessly and listlessly over the period of years from a distance of from some three to five miles between the 500-foot contour lines and has in the past covered much, if not all, of the Bonelli land (Davis Dam Quadrangle, Exhibit J). From the evidence presented to the trial court no one could nor could evidence pin-point at any one time during the meanderings of the River where the main stream of the Colorado River flowed until the active flow of the River was rechanneled in 1959 by the Bureau of Reclamation in the area of the Bonelli land. This rechannelization restricted the main flow of the River to occupy only a portion of the Bonelli land ("composite plat", p. 54 this brief; and "1962 dependent resurvey", *infra*).

But not only did the River meander from west to east. History also shows that prior to the closure of Hoover Dam in 1935 uncontrolled water levels fluctuated tremendously from year to year; several flood conditions prevailed nearly every year and water shortages occurred in some years (Lower Colorado River Land Use Plan, *supra*). The velocity of the water and the amount of silt that the Colorado River has carried and the great floods that have raged down its course has made it anything but a river of slow and imperceptible movement (Ten Rivers in America's Future, Basins of the West, The Colorado, 1950 Vol. 2, p. 355-462). As described by the Arizona Court of Appeals in *Arizona v. Gunther & Shirley Company*, 5 Ariz. App. 77, 423 P. 2d 352 (1967) at 353:

> "The Colorado, rushing as it does down from the mountains, scours its river bed through the Grand Canyon of the Colorado, and is one of the major silt-carrying rivers of the world.
>
> • • • • • •

"Before the River was controlled by the Dams, the Colorado normally flowed at the rate of 15,000 to 20,000 cubic feet per second past the Yuma Narrows, though at flood stage over 200,000 cubic feet per second has been recorded."

About the time the township was surveyed in 1905, it is a well-known historical fact that the Colorado River broke its banks and moved westward forming the Salton Sea (Encyclopedia Britannica, Vol. 19, 1939 Ed. p. 902). It is also a well-known fact that at one time the Colorado River in the Blythe, California, area again broke its banks, flooded westward and encircled Blythe making it a part of Arizona.

This continuous change in the channel of the Colorado River was of grave concern to California, Nevada and Arizona and for many years before the adoption of the Interstate Compacts defining the boundaries between California, Nevada and Arizona raised serious jurisdiction questions, both civil and criminal.

As previously stated, when Arizona was admitted to the Union, the boundary between Arizona and Nevada lay a considerable distance west of the Bonelli land ("composite plat", p. 54 this brief). By virtue of the Colorado River Boundary Compact between Arizona and Nevada approved by Congress June 16, 1961, Public Law 87-50, 87th Congress, 1st Session, 75 Stat. 93, the boundary now lies down the center of the Colorado River as rechanneled by the Bureau of Reclamation in 1959, and because of the artificially created active flow channel of the Colorado River on both the east and west sides of the channel (or on the Arizona and Nevada sides, respectively), part of the Bonelli land as originally conveyed by the Santa Fe Railroad now lies in Nevada on the west side and in Arizona on the east side ("composite plat", p. 54 this brief).

In December of 1961 the Bureau of Land Management caused to be made a limited dependent resurvey of Sections 2 and 10, Township 19 North, Range 22 West, the plat of which resurvey became official when approved by the Bureau of Land Management on October 12, 1962. This plat is not a part of the appendix but is a part of the record before the Court as Exhibit G to the agreed statement of facts and nine copies of the full scale plat for the convenience of the members of the Court will be filed with the Clerk separately at the time this brief is filed. A reduced copy of this plat is made a part of this brief (p. 55) and hereafter for brevity reference to this plat will be to "1962 dependent resurvey".

SUMMARY OF ARGUMENT

Foreword

In presenting these vital questions to the Court we are fortunate in having an excellent up-to-date article not only covering the general subject matter, but specifically covering the Arizona Supreme Court's decisions in *Bonelli* and the Federal Court's decisions in *Claridge*. This is the article written by Robert E. Lundquist for the Arizona Law Review, No. 2, Volume 14, entitled *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, which article was filed with the petition herein as Appendix I. We feel that the burdens on the Court in deciding this important matter will be considerably lessened by this excellent article even though perhaps the Court and respective counsel may not fully agree or concur with the article or the conclusions made therein.

I

The fundamental purposes of the grant to the states of the beds of navigable streams as stated by this Court

in *Pollard v. Hagan, infra,* and subsequent decisions, confirmed in 1953 by Congress in the enactment of the Submerged Lands Act, was to provide in the sovereign states the right to protect to the public access to navigable streams to use for highways of navigation, commerce, and related activities. This grant was never intended to extend over large areas of exposed land previously lost by riparian owners as the main thread of the stream moved, particularly when the exposed land was caused by works done by the Federal government to improve navigation and other legitimate purposes. The sovereign states own the lands beneath the navigable stream as a servitude only and when the river is gone or destroyed either through natural or man-made causes the reason for the servitude is gone and the limitation of the servitude, if any remains, is to that channel remaining navigable, namely the main thread of the navigable stream.

II

When the flow pattern or the location of the main channel of a navigable stream is changed by the Federal government in the exercise of its power under the commerce clause, and specifically under statutes such as the Boulder Canyon Act, for legitimate purposes thereunder and is not done for the purpose of changing land titles, the State's ownership of the bed of such navigable stream is limited to the bed of the stream after such works are completed, namely the main channel; and title to the exposed dry beds resulting from such channelization reverts back to the original owner, be it an individual, the United States, an Indian tribe or the State itself.

III

Federal law, not State law, controls the ownership of land gained or lost by accretion title to which land was conveyed prior to statehood by the United States.

IV

The rule adopted by the Arizona Supreme Court as to ownership of exposed land along the Colorado River after channelization affecting fee lands the source of title of which came from the United States would apply as well under the grant at statehood of title to the beds of navigable streams to not only Indian lands but any and all other types of land owned by the United States notwithstanding any provisions of the Enabling Act or Constitution of Arizona or Executive Withdrawal Orders withdrawing lands along the Colorado River to the contrary.

V

The Submerged Lands Act granted no new rights or grants of land to the State but merely confirmed as a quit-claim all previous rights in navigable rivers; furthermore, the Submerged Lands Act specifically exempted from the provisions thereof persons who held legal title to submerged lands obtained from the United States prior to statehood.

VI

The decisions of the Arizona Supreme Court constitute a taking of the Bonelli land without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 2, Section 17, of the Arizona Constitution and, as applied to other fee lands along the Colorado River, constitute a taking of these lands without due process of law prohibited by the Fourteenth Amendment to the Constitution of the

United States and Article 2, Section 4, of the Arizona Constitution, regardless of whether the taking is attempted by judicial fiat, legislation or a taking by the Executive Department. The doctrine of sovereign estoppel should be invoked for such taking which is occurring almost fifty years after the executive and legislative departments of the State government have been continuously advised from time to time over the fifty-year period of the State's possible ownership of lands bordering a navigable stream but which departments failed to act in asserting the State's ownership and the ownership was not asserted until the lands were highly developed and improved, and then the ownership was asserted only by judicial fiat retroactively applied by the judicial department of the State government.

ARGUMENT

I. Whether the Ordinary High Water Mark and Bed of a Navigable River Is Established by and Includes all of the Area Below the Line Created by the Water During the Usual High Flow Stage of the River's Annual Cycle.

In both of its decisions the Arizona Supreme Court ignores decisions of this Court to the contrary, particularly the decisions of the United States District Court for Arizona and the affirming decision of the 9th Circuit Court of Appeals in *Claridge* (279 F. Supp. 87 (1967); 416 F. 2d 933 (1969) and holds Arizona's ownership extends to the high water mark as it existed during time of high seasonal floods prior to the construction of Hoover Dam and the closing of its gates in 1935. In other words, this line as defined by the Arizona Supreme Court extends over and upon, in this immediate area, Sections 32 and 35, Township 20 North, Range 22 West; Sections 2, 10 and 11, Township 19 North, Range 22 West, and over a large area of the Fort Mohave Indian Reservation to the south in unsur-

veyed Township 19 North, Range 22 West (see Davis Dam Quadrangle, Exhibit J, and 1960 Mosaic Aerial Photo, Exhibit D, *supra*).

Justice Struckmeyer, speaking for the majority court, concludes in the supplemental opinion:

> "The high water mark, therefore, may be defined as to the line to which high water ordinarily reaches, and is not the line reached by the water in unusual floods. It is that line below which the soil is unfit for vegetation or agricultural purposes." (495 P. 2d 1314, 1315.)

This line as fixed by the Arizona Supreme Court is shown on the "composite plat", p. 54 this brief.

Previous decisions of this Court have held to the contrary. In the early Alabama case of *Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed 331 (1894), which shortly followed *Pollard v. Hagan*, 3 How. 212, 11 L. Ed 565 (1845), this Court again stated the rule of state's ownership to be:

> "By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore the title, jus privatum, in such lands, as of waste and unoccupied lands, belongs to the king, as the sovereign; and the dominion thereof, jus publicum, is vested in him, as the representative of the nation and for the public benefit." (pps. 551, 552, 14 S. Ct.)

Later in the case of *Oklahoma v. Texas,* 258 U. S. 574, 42 S. Ct. 406, 66 L. Ed 771 (1922) at 779 this Court held that when the term "middle of the main channel" and "mid-channel" was used when applied to navigable streams, such terms usually referred to the thread of the navigable current; and, *if there be several,* to the thread of the one best suited and ordinarily used for navigation.

In the subsequent case of *Oklahoma v. Texas,* 260 U. S. 606, 43 S. Ct. 221, 67 L. Ed. 428 (1923) this Court defines the boundary line on page 431:

> "This court, upon much consideration, held that the boundary was not at the line of ordinary low water, but along the waterwashed bank or elevation which bounds the river bed and confines the water within definite outer limits, save in the exceptional instances when it is so far at flood that it overflows its restraining banks and spreads over adjacent lands. * * *"

and further states on page 432:

> "It neither takes in over-flowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture."

This test is met by Justice Lockwood in her dissenting opinion in *Bonelli* where she states at page 706, 489 P. 2d, as a fact that the lands involved in the Bonelli litigation consist of agricultural developments bordering the Colorado River and, as stated by petitioner Mohave County, involves highly developed subdivision land along the Colorado River in Mohave County.

Later this Court in *United States v. Arizona,* 295 U. S. 174, 55 S. Ct. 666, 79 L. Ed 1371 (1935), which involved the right of the Federal government to construct Parker

Dam on the Colorado River states on page 1375 (referring to the proposed dam):

> "Its ends rest on public lands of the United States in Arizona and California."

On page 1377 the Court defines the ownership of Arizona in and to the bed and stream of the Colorado River as follows:

> "Arizona owns the part of the river bed that is *east of the thread of the stream.*" (Emphasis supplied.)

and further continues by subjecting this title to the paramount right of the United States to construct works on a navigable stream under the commerce clause stating that under that clause Congress has power to cause to be built a dam across the river in aid of navigation. If Parker Dam had been built on the Bonelli land and if the Arizona Supreme Court decisions in *Bonelli* had been in effect at the time of the construction of Parker Dam, Parker Dam would have been at the point of the Bonelli land over a mile wide from the center of the stream as now channelized for the reason that the dam's ends could not have rested upon public lands of the United States, at least on the Arizona side, without extending over a mile from the present channelized stream bed to the eastern boundary of Arizona's ownership in Section 2. Even under the *Claridge* decision (as hereinafter discussed) from the present channelized channel the dam would have been constructed over one-half a mile in length from the center of the stream.

In the trial court's decision in *Claridge*, Judge Craig briefly states the history of the Colorado River as follows:

> "Historically and prehistorically, the Colorado River has been at its peak flow, a turbulent and violent river, carrying enormous quantities of water, and with the water, great quantities of silt and alluvion. Over the

ages the deposit of the silt and alluvion by the river has resulted in the construction of the alluvial plain which constitutes the floor of the Valley. Since 1874, when attempts to measure the seasonal flow of the river and surveys were undertaken to establish its location, the meanderings of the river have been generally confined to the easterly side of the Valley, along the Arizona side or bluff." (279 F. Supp. 87 at 89.)

and holds that the land in question before him for decision was involved in one of the reclamation withdrawal orders along the Colorado River unless it lies within the bed of the river between the easterly ordinary high water mark and the thread of the river to the west.

In rejecting Arizona's claim to the ownership of the high water mark during high flood times to cover the entire flood plain, Judge Craig made some very pertinent findings of fact, namely:

"2. The present ordinary high water mark of the river exists by virtue of the controlled flow of the river through Hoover Dam and other dams upstream from the lands in question.

"3. The lands in question are located to the east of the present ordinary high water mark of the Colorado River.

• • • • •

"5. The present ordinary high water mark of the Colorado River so far as it relates to the lands in question *is within the existing banks of the river,* the easterly such bank lying to the west of the most westerly limits of the land in question.

"6. No part of the lands in question lie within the bed of the Colorado River *from the thread of the river* to its easterly bank, or otherwise." (279 F. Supp. 87 at 90; emphasis supplied.)

and concludes on page 91 as a matter of law:

> "1. The ordinary high water mark of a river is a natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and *does not extend to the peak flow or flood stage so as to include overflow on the flood plain,* nor is it confined to the lowest stages of the river flow.
>
> "2. *The ordinary high water mark of the Colorado River* at the location in question *is within the existing banks of the river to the west of the lands in question, regardless of the activity by the United States in constructing certain works within the river to confine and improve the channel, which work has been undertaken within the purview of the Boulder Canyon Project Act.* 43 U. S. C. ¶ 617 et seq." (Emphasis supplied.)

In affirming Judge Craig in *Claridge,* the Ninth Circuit Court of Appeals holds on page 934 (416 F. 2d):

> "(A)ppellants' theory is founded *on the mistaken assumption* that the annual spring floods of the river (suffered prior to the advent of Hoover Dam), *which covered the valley from bluff to bluff, constituted its 'ordinary high water' and that the valley, from bluff to bluff, thus constituted the bed of the river.* By eliminating these floods, appellants contend, *the Hoover Dam caused an avulsive change in the flow of the river* so that the United States as riparian owner did not take title to the flood plain." (Emphasis supplied.)

and concluded that appellants' definition of "ordinary high water mark" *is unsound,* approving the statement made by Judge Craig under "2" above. It must be remembered the appellant urging this theory was the State of Arizona, whose petition for certiorari was denied by this Court (397 U. S. 961, 90 S. Ct. 994, 25 L. Ed 2d 253, March 2, 1970).

Judge Cameron in the *Bonelli* Arizona Court of Appeals decision also refused to follow Arizona's contention, pointing out that Arizona does recognize riparian rights as far as land title is concerned and one of these important rights is access to the water, and to allow Arizona to retain title to the intervening property would allow Arizona to terminate this very valuable right. Judge Cameron concludes that Arizona could not claim title to the area between the Colorado River and the Bonelli land after rechanneling. In other words, Arizona's ownership was limited to the east bank of the manmade channel. (464 P. 2d 1005, 1006; App. 38, 39.)

Justice Lockwood in her dissent also recognizes riparian ownership in the following language appearing on page 706 et seq., 489 P. 2d:

> "Owners of land abutting the river owned only to the high water mark, under the common law. As to their rights upon a change in the river's banks, the common law rule with regard to accretion and reliction was not necessarily in conflict with Arizona law. The nature of the title to the riverbed so acquired, however, is another matter. As stated in State v. R. E. Janes Gravel Co., 175 S.W.2d 739 (Tex. Civ. App. 1943; reversed on other grounds in Manfrais v. State, 142 Tex. 559, 180 S.W.2d 144 (1944)), "the title to a riparian owner is 'a base fee, determinable upon the occupancy of his soil by the river,' and that the title of the State to the riverbed is likewise a 'base or qualified' fee, 'determinable in favor of the riparians upon the abandonment of the bed by the river.' 175 S.W.2d at 741.
>
> "This holding is entirely consistent with the provision in our Constitution that no private property should be taken or damaged for public or private use without just compensation having been first made. Article 2, § 17, Arizona Constitution. The state properly has a governmental interest in the control of the

navigable river, and therefore in the land beneath it, so long as the river covers the land of a riparian proprietor. However, it is when the river is withdrawn from land originally owned by the riparian proprietor that governmental interest ceases to exist. It is more consistent with Article 2, § 17 of our Constitution that the riparian proprietor's property right, hitherto subjected to the qualified fee of the state by the accretive movement of the river, should be completely restored to him; otherwise there is a taking by the state of private property for public use without just compensation. To permit the state to retain title to the property under such circumstances would controvert the provision of the Constitution.

"To hold, as I believe we should, that the state's qualified title is terminated, and the riparian proprietor's title is released from its subservience, is in harmony with and is not repugnant to or inconsistent with the provisions of Article 2, § 17, supra, or of A.R.S. § 1-201."

This riparian right has also been held by this Court to be a valuable property right protected by the Constitution of the United States in the case of *Hughes v. Washington, infra.*

The very purpose of the grant to the states of title to the beds of navigable streams, as stated by this Court in *Pollard, supra,* and the confirmation of such grant by the Submerged Lands Act was to provide in the sovereign the right to protect to the public the right to access to navigable streams by the ownership of the bed of the stream under the water. The state owns the land beneath a navigable stream as a servitude only and when the river is gone or destroyed either through natural or man-made causes, the reason for the servitude is gone and the limitation of servitude, if any remains, is to that channel remaining navigable or, as stated above, the main thread of the

navigable stream. (See statement above by Justice Lockwood; also analysis of decisions by Justice Lockwood immediately following the statement.)

No channelization was involved in *Claridge*. The Colorado River at the point involved in *Claridge* was flowing in a natural channel as stabilized by the construction and release of water from Hoover Dam. Therefore Arizona's ownership is limited to the east bank of the Colorado River as it now flows over and upon the Bonelli land in the man-made channel created by the Bureau of Reclamation under the rule stated in *Claridge* and the authorities cited above and in Justice Lockwood's dissent.

The question necessarily arises: Can a legitimate state governmental function be ascertained and supported by either a statute or judicial decision which allows the state to retain ownership to lands formerly submerged that have been permanently artificially restored to exposure to the extent that the lands not only can be used for agricultural purposes for the growing of crops but can be used for industrial and homesite development and are of no further significant value for navigation purposes? The answer clearly must be in the negative for the reason that there is no legitimate governmental function or duty associated with this claimed ownership for the benefit of the public as a whole to provide access to the waters of the newly established navigable stream, particularly when the exposed area could extend over a long distance from the banks of the newly created navigable stream.

This is the effect of the Arizona Supreme Court decisions. To ratify the rule as adopted by the Arizona Court would place the Federal government in the absurd position of channelizing the Colorado River (which it proposes to do, see Lundquist, Arizona Law Review, Pet. App. I, p. 315 and Brief of Amicus Curiae County Attorney of Mohave

County) and by this channelization it would provide the means of a grant of additional exposed land to Arizona. As a result the Federal government would have no access to the River except across State land (presumably with the permission of the State) and even then to the extent of possibly losing access to maintain the levees built for channelization of the River.

It is therefore respectfully submitted that the Federal government, having full power and authority under the commerce clause to change the flow pattern and the location of the Colorado River for its legitimate purposes (navigation and other), limits the State's ownership as originally intended for the purpose of sovereign control of access to the navigable stream to the bed of that stream as it exists after channelization and *title to the exposed dry bed of such river after channelization reverts back to the original owner,* be it an individual, the United States, an Indian tribe or the State itself.

II. Whether Changes in the Flow Pattern of a Navigable River Caused by the Construction of Dams and Rechannelization of the Stream Bed by the United States Changes or Alters the Ordinary High Water Mark for the Purposes of Changing or Altering the Ownership of the Exposed Lands Resulting from the Construction of Such Works.

The United States through its Bureau of Reclamation, without permission or consent from or by Bonelli or any express consent by the State, changed the channel of the Colorado River by relocating and rechanneling it in the latter part of 1959 and the early part of 1960. This caused an abandonment by the River of a large portion of the Bonelli land. (495 P. 2d at 1314; see also paragraph V, agreed statement, App. 8.)

The Arizona Supreme Court in its supplemental decision rejecting the *Claridge* decisions states:

"The subsequent artificial control of the river could not deprive Arizona of property rights in the bed which were constitutionally vested prior to the completion of the Hoover Dam in 1938 (*sic*) and the later rechannelization by dredging." (495 P. 2d at 1314.)

This rechannelization was done for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River under the broad powers of the Boulder Canyon Act, 43 U. S. C. § 617. No part of the lands in question lie within the bed of the Colorado River from the thread of the river to its easterly bank. By accomplishing these purposes in the rechannelization work, the Bureau of Reclamation limited the main thread of the Colorado River to a man-made channel which in fact made the stream once again navigable at this point. There is absolutely no indication in the record or in the court decisions that at any time the Federal government in constructing Hoover Dam, Parker Dam, the channels mentioned in *Claridge* or the man-made channel at the point of the Bonelli land or at any other point in the Colorado River made these improvements which altered in some instances the course of the flow of the River for the purpose of changing ownership to the lands exposed by such works.

The Ninth Circuit Court of Appeals in *Beaver v. United States*, 350 F. 2d 4 (1965) (cert. denied 383 U. S. 937, 86 S. Ct. 1067, 15 L. Ed 2d 854 (1966) in which Arizona appeared as amicus curiae in support of the petition) states the general rule to be that unless man-made works were done on the Colorado River for the specific purpose of changing title to land, such works have no effect upon title.

In the case at bar it is clear that the water was suddenly removed from the Bonelli land by man-made avulsion through the rechannelization work by the Bureau of Reclamation and therefore the doctrine of re-emergence would

apply and limit Arizona's ownership to the east bank of the existing navigable river as shown by the "1962 Dependent Resurvey", p. 55 this brief, and *not* the old left bank of the Colorado River as shown on said survey for the reason there was no attempt made by the Bureau of Land Management to retrace and re-establish the boundaries of Section 3 (the Bonelli land) by the dependent resurvey, but the dependent resurvey was limited to retracing and re-establishing Sections 2 and 10.

As Judge Cameron held in his decision for the Court of Appeals (App. 39, 464 P. 2d at 1006) the doctrine of re-emergence of the Bonelli land should apply herein, citing *Philadelphia Co. v. Stimson*, 223 U. S. 605, 624, 32 S. Ct. 340, 56 L. Ed 570 (1912) and also *Beaver, supra*. Here in Bonelli we have no difficulty from the maps and plats of record and the aerial photographs in easily identifying the previous riparian land that Bonelli lost and which has re-emerged from the stream bed by reason of rechannelization.

Therefore Arizona's ownership to the bed of the navigable stream moved with the rechannelized main thread of the stream as changed by the construction works of the Federal government and its sovereign rights to control access for the benefit of the public to the bed of the rechannelized navigable stream remained. To hold otherwise, one must read into *Pollard, supra,* and the Submerged Lands Act a grant of land to the sovereign states never intended by this Court or by Congress to large areas of river bed thus exposed by such navigation works, which areas are not necessary for navigation or for public access to the navigable stream.

Mr. Lundquist in Arizona Law Review, Pet. App. I, page 329, refers to a dredging case decided by the Alabama court in *State v. Gill*, 259 Ala. 177, 66 So. 2d 141 (1953) and states this case:

"(I)s exemplary of third-party reclamation by dredging in the main channel and is remarkably similar to the *Bonelli* situation. In order to gain access to the dock of an ammunition dump, the United States Government dredged a channel in Mobile Bay and cast the dredged material along the shoreline, including the portion owned by the plaintiff. This strip of dredged land cut off plaintiff's access to the bay. He received no compensation and could not have successfully demanded it of the federal government. The Alabama court denied the state's claim to the new land, holding that the title was in the plaintiff as the upland owner. The court noted that although the federal government had the implied sanction of the state as owner of the bed to dredge the channel, that sanction was for the improvement of navigation and commerce, and not for the purpose of raising the bed above sea level."

and quotes from the Alabama court:

"It is obvious that we do not have in the case at bar an accretion by any slow or imperceptible processes. It has been suggested that the speeded up, artificial accretion, such as we have in the present case could well be called 'streamlined accretion' or perhaps a reclamation.

. . . [W]here there is what we have termed a streamlined accretion . . . title to such made-land is conferred upon the upland owner, subject only to the paramount rights of the United States and the State *in aid of navigation*. We understand that the title to the bed or bottom beneath navigable waters is in the state, but this is a title to the bed as a bed. . . . The state still owns the title to the bed beneath navigable water, but the made-land being added to the property of the riparian or littoral owner becomes his property.[22] [Emphasis added.]"

Mr. Lundquist concludes:

"Thus the navigational purpose rule was reaffirmed. The new land had no substantial connection with the

navigational project since navigation was not aided by placing the dredged material in front of this particular upland, and the new land was not needed as a part of the project." (Emphasis supplied.)

This principle, it is respectfully submitted, is the same conclusion reached by Judge Craig in *Claridge* and affirmed by the Ninth Circuit Court that the ordinary high water mark to which the extent of the State's ownership prevails *is within the existing banks of the Colorado River as re-channelized* (see "1962 Dependent Resurvey", p. 55 this brief) not only on the Arizona side of the River but also on the Nevada side where lies some forty acres of Bonelli land now exposed.

III. Whether Federal or State Law Controls the Ownership of Land Gained or Lost by Accretion on Property Conveyed by the United States Prior to Statehood.

This Court's decision in *Hughes v. Washington*, 389 U. S. 290, 19 L. Ed 2d 530, 88 S. Ct. 438 (1967), conclusively answers this question; that is, that Federal law controls the ownership of land gained or lost by accretion conveyed prior to statehood by the United States.

As was true in *Hughes*, Bonelli's predecessor in interest, the Santa Fe Railroad, acquired this land by virtue of a congressional grant two years before statehood and when the land was acquired, according to the plat of survey, the Colorado River was some distance west of the area now in question (see 1906 Official Plat of Survey, Exhibit B, App. 15; and also "composite plat", p. 54 this brief.)

We have before us a rule of ownership pronounced by our Federal courts in *Claridge* fixing the boundary of Arizona's ownership at one point and a rule by the Arizona Supreme Court fixing the State's ownership at another point, involving in the particular instance on the Bonelli

land an additional area in taking of the Bonelli land and extending into Federal land to the north, east and south. As stated by the Attorney General on page 5 of his response to petition:

> "The holding of the Court below is extremely different from the holding of the Court in United States v. Claridge, 279 F. Supp. 87, aff'd 9th Cir., 416 F. 2d 933 *where the identical questions involving lands adjacent to the Colorado River were presented for decision and the opposite result reached.* The Court there held that the 'ordinary high water mark' of the Colorado River is the point to which the waters usually reach today. That decision disregarded the changes in the 'natural river' as it existed prior to the closure of Hoover Dam and the 'stabilized river' as it exists today." (Emphasis supplied.)

If the *Claridge* rule is to be applied as limiting Arizona's ownership today to the east bank of the Colorado River as rechannelized, which we respectfully submit is the rule in *Claridge,* then we have a much greater portion of the Bonelli land revesting in Bonelli by virtue of re-emergence.

If this were not a boundary case where the boundary between Arizona and Nevada is fixed by compact to the center of the re-channelized stream, the Arizona rule could very easily cover lands between the two 500-foot contours as shown by the Davis Dam Quadrangle (Exhibit J), or a distance of approximately four to five miles in the area of the Bonelli land. On the other hand, the rule in *Claridge* before channelization but after the construction of Hoover Dam in 1935 would limit the area to about two-thirds of Section 3 (the Bonelli land) on both sides of the River as shown on the Davis Dam Quadrangle.

As stated by Justice Black in *Hughes, supra,* quoting from *Borax, Ltd. v. Los Angeles,* 296 U. S. 10, 80 L. Ed 9, 56 S. Ct. 23 (1935):

> "'(t)he question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." (19 L. Ed 2d 530 at 533.)

and concludes on page 534:

> "Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines."

Although *Hughes* involved tidelands and the gain of land by accretion by the patentee, the converse would be true if there was a loss of land by accretion. The rule clearly applies to a case where a state attempts to take away rights lost by accretive movement on a navigable stream and then is restored by the Federal government in the exercise of its legitimate control over navigable streams.

As stated by the Attorney General on page 7 of his response to petition and as shown by Pet. App. F and the Unofficial Land Status Map of the Lower Colorado River Area a part of the Report, *supra*, filed separately with the Clerk of this Court:

> "Throughout the length of the Colorado River along the western boundary of Arizona, thousands of acres of land are encompassed between these two 'high water marks' and title questions will continue to arise."

Unless we are to follow the Federal law as announced in *Claridge* by this Court reversing the rule in *Bonelli* adopted by the Arizona Supreme Court, there will be a constant state of confusion and chaos resulting from the

attempt to apply two different rules of law as to title and the boundaries fixed by the respective decisions. Such resulting confusion will not only affect existing land titles already vested but undoubtedly titles that will become vested or acquired in the future by grants from the United States, and only the Congress of the United States and the Legislature or people of Arizona by constitutional amendment *by joint action* could possibly permanently resolve the conflict between the two decisions as to the question of ownership.

IV. Whether the Decisions of the Arizona Supreme Court Affect Title to Federal and Indian Lands as Well as Private Lands Bordering the Colorado River.

As stated before, the Arizona Supreme Court's decision extended the ordinary high water line of State ownership in the immediate vicinity of the Bonelli land to portions of Sections 32 and 35, Township 20 North, Range 22 West, and Sections 2, 10 and 11, Township 19 North, Range 22 West to the east and south (which are fee and public lands) and over a large area of the Fort Mohave Indian Reservation to the south in unsurveyed Township 19 North, Range 22 West (Davis Dam Quadrangle, Exhibit J; 1960 Mosaic, Exhibit D, App. 6 et seq., and "composite plat", p. 54 this brief).

According to information furnished by the Bureau of Land Management (Pet. App. E, p. 1e, 2e, 3e) approximately 87 miles of 273 miles of shoreline in Arizona (or 32%) is owned and controlled by the Bureau of Reclamation and the Bureau of Land Management; approximately 71 miles (or 26%) is owned by the Federal government but under the control of the Bureau of Sports, Fisheries and Wildlife; and approximately 59 miles (or 22%) is within the exterior boundaries of Indian reservations. Without any breakdown,

it is shown that approximately 45 miles (or 16%) is owned by the State of Arizona and individuals. However it is agreed that by virtue of the Reclamation Withdrawal Order of January 13, 1903, and subsequent withdrawal orders, Arizona's ownership consists of a very small portion of the area although it is indicated otherwise on the maps hereinafter referred to. This is indicated by the Lower Colorado River Land Use Report, *supra*, where on page 14 thereof it is stated that approximately 15% of the riverfront lands in the Lower Colorado River Valley are in private ownership.

As a part of this Report there is contained three sheets entitled "Unofficial Land Status Map of the Lower Colorado River Area". On page 4 of the omitted memorandum of law in support of Bonelli's motion for rehearing before the Arizona Supreme Court (App. 55), reference is made to this Report and to an enlarged certified copy of these three map sheets dated March 1964, revised February 1969, April 1971 and July 1971, together with a colored copy thereof showing the fee and State land status along the immediate east bank of the Colorado River. These maps are before this Court on the record transmitted by the Clerk of the Arizona Supreme Court and Sheet 1 shows in black the Bonelli land (see Fig. 11, Pg. 54 of Report, *supra*). While these maps are not in all respects accurate as to land status, they are sufficiently accurate to show the approximate land ownership status of lands along the eastern bank of the Colorado River (see also Pet. App. F).

All lands in Arizona lying within six miles of the Colorado River west of the 114th Meridian were withdrawn by Executive Order of the Secretary of the Interior on January 13, 1903, issued pursuant to an Act of Congress June 17, 1902, 32 Stat. 388 (petition, p. 34; see also Judge Craig's findings in *Claridge*, 279 F. Supp. 87 at 90).

On the Arizona side of the Colorado River, there are two main Indian reservations, to-wit: The Mohave Indian Reservation which was formerly two old army forts established in 1870 and later transferred to the Indian Service for the benefit of the Fort Mohave Indians by executive order, which is located immediately adjacent on the south to Section 10 (public land) and Section 10 is immediately adjacent on the south to the Bonelli land as shown on the plats of record and the "1962 Dependent Resurvey"; and the Colorado Indian Reservation which is located in Yuma County, Arizona, between Parker and Ehrenberg.

Arizona's Enabling Act (p. 8 this brief) specifically required as a condition to statehood that the people of Arizona disclaim all right, title and claim to unappropriated and ungranted public lands within the Territory and to all lands lying within the Territory owned or held by any Indian or Indian tribes. The people in conformity to this mandate from Congress did in Article XX, Section Fourth, of the Ordinance provision of the Constitution disclaim forever all right, title and claim to said public and Indian lands (p. 8 this brief).

Notwithstanding these prohibitions by Congress and disclaimers by the people of Arizona, the Arizona Supreme Court in *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P. 2d 421 (1968), (a case involving personal injury occurring on the Colorado River within the exterior boundaries of the Colorado River Indian Reservation) held that the State held the title and control of the submerged lands and navigable waters of the Colorado River as it ran through the Reservation. In question in this case was the construction and interpretation of the Executive Order of May 15, 1876, establishing the Reservation. The Supreme Court found:

> "Even though President Grant could have reserved the beds and waters to the Colorado River Indian Tribe, his order of 1876 lacked the 'clear intention' necessary to make such a conveyance. (Citing cases.) There has been no 'peculiar need' shown in this case which would infer Executive Intent that submerged lands and navigable waters be included in the grant of May 15, 1876."

and concluded at 423:

> "We therefore hold that the State of Arizona holds title and control over the submerged lands and navigable waters where the accident occurred."

We have been unable to obtain clear, readable and concise copies of the numerous withdrawal orders relating to the Fort Mohave Indian Reservation. In the language of the Arizona Supreme Court in *Morgan* unless these Executive Withdrawal Orders reserved the bed underneath the waters of the Colorado River as it flowed through the Fort Mohave Indian Reservation to the Indian tribe, title and control of the submerged lands under the navigable waters of the Colorado River vested in Arizona upon statehood and as the River moved eastward (see Davis Dam Quadrangle, Exhibit J; 1960 Mosaic) title to the bed vested in Arizona with the movement of the River. Under the *Bonelli* decisions it is clear this title extended to the high water mark defined in *Bonelli* and that title to the exposed land after rechannelization remained in Arizona, as it did in *Bonelli*, and was never revested in the Indian tribe.

If the *Bonnelli* and *Morgan* decisions are correct and upheld as a matter of law we can see no difference in the impact of these decisions on the Bonelli and other fee land, the Indian land and the public land lying along the full course of the Colorado River as it flows below Hoover Dam, based upon Arizona's interpretation of the grant to states as announced by this Court in *Pollard, supra,* and later confirmed or quit-claimed by the Submerged Lands Act.

It must follow therefore that the same rule adopted in *Bonelli* by the Arizona Supreme Court relating to fee lands, the source of title of which came from the United States, would apply as well under the grant at statehood also to Indian lands and to all other types of public lands owned by the United States notwithstanding any provision of the Enabling Act, the Constitution of Arizona or Executive Withdrawal Orders to the contrary.

V. Whether the Latter Decision of the Arizona Supreme Court Dated April 13, 1972, Misconstrues or Misinterprets the Submerged Lands Act of Congress as a Grant by Congress to the States of Lands Formerly Beneath Navigable Waters Up to the Ordinary High Water Mark Without Recognizing That Said Act Specifically Exempts from the Effect Thereof Any Lands to Which Title to the Beds of Such Streams Was Lawfully Patented or Conveyed by the United States or Any State to Any Person (43 U. S. C. 1301(f)).

The majority supplemental decision of the Arizona Supreme Court of April 13, 1972, places great reliance as authority for the first decision of October 4, 1971, as well as in support of the supplemental decision, the fact that the Submerged Lands Act not only quit-claimed but made an additional grant of submerged lands not originally granted by this Court in *Pollard, supra.* The majority opinion, however, does not qualify the Court's interpretation of the Submerged Lands Act by the exception stated therein in Section 1313(a) of the Act, which reads in part:

> "(a) • • • all lands expressly retained by or ceded to the United States when the State entered the Union • • •". (C. 65, Title II, § 5, 67 Stat. 32, 43 U.S.C. § 1313.)

or Section 1311(a) of the Act which reads in part:

> "(a) • • • or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective

grantees, lessees, or successors in interest thereof;". (C. 65, Title II, § 3, 67 Stat. 30, 43 U. S. C. § 1311.)

or the exceptions under "definitions" in Section 1301(f) exempting from the Act title to the beds of such streams lawfully patented or conveyed by the United States or any State to any person (C. 65, Title I, § 2, 67 Stat. 29, 43 U. S. C. § 1301(f)).

It clearly appears from the history of Arizona law that on June 5, 1950, Bonelli was the record owner of the land in question subject only to whatever rights Arizona might have acquired to the bed of the main thread of the Colorado River by its movement from west to east. The Davis Dam Quadrangle, Exhibit J, also clearly indicates that in 1950 title to a substantial portion of the Bonelli land would remain vested in Bonelli, particularly in the southeast corner and islands existing in the River for the reason that Arizona at that time had no statutory or judicial made law to the contrary.

We further submit that it was never intended by this Court in its land-mark decision of *Pollard, supra,* or the intent of Congress by the enactment of the Submerged Lands Act to grant to the states as they were admitted to the Union any title to the beds of navigable streams of any area not required for the states to hold in trust for the public in order to provide the public access to the navigable stream. Clearly it was never intended that this grant to the states would provide the vehicle for a state to gain title to large areas formerly covered by the waters of a navigable stream to use for purposes other than navigation or to vest title in the states of these exposed areas in a proprietary rather than sovereign capacity.

The Arizona Supreme Court also completely ignored the other exception contained in Section 1301(f) of the Act,

supra, for it is possible that upon conveyance by the United States to Santa Fe a portion of the land was underlying the Colorado River and as the River moved in a slow and imperceptible manner to the east Santa Fe's title and later Bonelli's title followed the movement of the River.

VI. Whether the Respective Decisions of the Arizona Supreme Court Constitute a Taking of Property by the State of Arizona Without Compensation Having Been Made Therefor in Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Provisions of Article 2, Section 17, Arizona Constitution.

Justice Struckmeyer speaking for the majority in the supplemental *Bonelli* decision of April 13, 1972, brushed off the contentions of amici curiae on rehearing that the first *Bonelli* decision would have a disastrous affect upon the ownership of lands and improvements along the Colorado River in the following language:

> "Appellee Bonelli and others who have appeared as amici curiae have principally advanced economic reasons for rehearing our decision in State v. Bonelli Cattle Company, 107 Ariz. 465, 489 P. 2d 699 (1971). Such are more properly matters of legislative consideration than the concern of a court whose responsibility is to adhere to the law as it finds it so that rights will not depend on the personal idiosyncracies of its members or hang in suspense when economic considerations change." (495 P. 2d 1312 at 1313.)[1]

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1. Undoubtedly Justice Struckmeyer in speaking of the personal idiosyncracies of members of the Court had in mind the position the Arizona Supreme Court found itself in the *Bristor v. Cheatham* cases wherein in the first decision, 73 Ariz. 228, 240 P. 2d 185 (1952), the members of the Court by a split decision held that percolating or ground waters were subject to appropriation in Arizona the same as surface waters. In 1953, after a change of membership in the Court, the Supreme Court reversed this decision, 75 Ariz. 227, 255 P. 2d 173, and upheld the long-time rule of property that percolating or ground waters were not sub-

As shown by the maps of record and the statistical data furnished by the Bureau of Land Management (Argument IV, *supra*) hundreds if not thousands of acres of fee land along the Colorado River are affected by the Arizona Supreme Court's decisions. It is stated on page 14 of the Lower Colorado River Land Use Report, *supra:*

> "Approximately *15 percent of the riverfront lands* in the Lower Colorado River Valley are in private ownership. These lands are, for the large part, irrigated agriculture lands and residential areas. A very small portion of the private lands is devoted to recreation purposes. Those private lands which are used for recreation resorts are in key or favorable positions on the river. As recreation needs increase, more use of private lands to provide commercial resorts and residential sites is anticipated." (Emphasis supplied.)

In Yuma County as stated by Justice Lockwood in her dissenting opinion, the importance of argicultural developments bordering the Colorado River is of great significance (489 P. 2d 699 at 706). The Report, *supra*, under the heading "Agriculture" states on page 17:

> "Large sections of the Lower Colorado River *bottom lands* and some adjacent mesas support intense irrigation farming. Such high value specialty crops as cotton, winter vegetables and citrus fruits, as well as staple crops and feed, are produced. Growing conditions and particularly climatic conditions are well adapted to crop production under irrigation and productivity is generally high. *The annual economic benefit to the Valley is estimated at approximately $80 million.*
>
> "Approximately 250,000 acres or 60 percent of the arable lands along the Lower Colorado River *are irrigated.* * * *". (Emphasis supplied.)

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ject to appropriation but belonged to the owners of the land. In other words, a change of membership in the Arizona Supreme Court since the *Bonelli* decisions could cause a complete reversal or modification of the previous *Bonelli* decisions and leave titles in a greater state or confusion.

In Mohave County, however, hundreds of acres along the Colorado River have been converted into valuable subdivision property and the value of the property, as well as the improvements thereon, will run into millions of dollars (see Amicus Curiae Brief of Mohave County Attorney and Amicus Curiae Brief of Land Owners in Section 15 before the Supreme Court on rehearing and Exhibit B attached to the latter brief, being an aerial photo dated June 28, 1970, of the subdivision known as Bermuda Plantations). The Report *supra,* (dated 1964) refers to Bullhead City, an area which is a short distance north of the Bonelli land, in the following manner on page 18:

> "Bullhead City is a 300-acre town of some 500 permanent residents. Its economy is centered around the recreational activities along a 15 mile stretch of the Colorado River above and below Davis Dam. As recreational activity increases, the town will grow, mainly to the south and east, South of Bullhead City residential subdivision activity has been increasing."

The 1970 census shows Bullhead City to have a population of 3200.

The owners of the fee land and improvements thereon along the Colorado River in Yuma and Mohave Counties have now been informed by the Arizona Supreme Court in the *Bonelli* decisions that title to their lands and improvements is vested in the State of Arizona. Justice Lockwood states in her dissenting opinion in the first decision (489 P. 2d 699 at 707) that the decision of the majority constitutes a taking by the State of private property and the improvements thereon without just compensation, and again states in her dissenting opinion to the supplemental decision of the majority:

> "(2) The decision violates the provisions of Article 2, § 17, Arizona Constitution, A. R. S., in that the result, i. e., permitting the state to acquire without compensa-

tion large quantities of property from private owners, constitutes a taking of the land for public use without just compensation having been made therefor." (495 P. 2d 1312 at 1315.)

The *Bonelli* decisions insofar as they affect and apply to other fee lands along the Colorado River definitely violates the provisions of Article 2, Section 4, of the Arizona Constitution, which reads as follows:

> "No person shall be deprived of life, liberty, or property without due process of law." A. R. S., Vol. I, Arizona Constitution.

for the reason that the taking of these fee lands by the *Bonelli* decisions has been accomplished by judicial fiat without due process.

Likewise the taking by the two *Bonelli* decisions of the Bonelli land and fatally clouding the titles (which is in effect a taking) of other fee lands and improvements along the Colorado River owned by other persons constitutes a direct violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The owners of the fee lands along the Colorado River (since prior to statehood in some instances such as the Santa Fe, now Bonelli land) have relied, which they had every right to do, upon the fact that their lands had not been invaded by the State of Arizona through the movements of the Colorado River because neither the Legislature nor the people of Arizona had ever legislated upon the subject matter as other states have nor had the State through its agencies ever asserted title to the lands gained by the movement of the Colorado River nor had the courts by judicial fiat in effect legislated on the subject matter and declared the extent of the State's ownership.

We have the exact situation at hand herein that Justice Stewart in his separate concurring opinion in *Hughes v. Washington, supra,* covers in the following language:

> "But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law *by the simple device of asserting retroactively that the property it has taken never existed at all.* Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. * * * ". (19 L. Ed 2d 530 at 535, 536.)

and concludes on page 536:

> "As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.* Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, *no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate,* I join in reversing the judgment." (Emphasis supplied.)

It is therefore clear that the legislative decisions of the Arizona Supreme Court retroactively applying a rule of property constitutes a taking of property by the State without due process and is a taking without payment of any compensation whatsoever for any lands that might lie

between the high water mark established by the Arizona Supreme Court in *Bonelli* and the center of the Colorado River as it now exists.

The record before the Supreme Court of Arizona on rehearing will disclose that at least as far back as 1925 the executive department of Arizona has been advised as to possible ownership by the State of lands along the Colorado River and also from time to time since then the Attorney General has advised the legislative department, at the request of the Legislature, the need for legislation (see also pages 3, 4, Attorney General's response to petition). But not until the advent of the *Claridge* case (and even then it was after the action had been commenced in the United States District Court) did Arizona ever assert ownership over the exposed beds of the Colorado River by leasing the land so exposed to Claridge. However under the *Claridge* decisions the State's claim and right to lease was declared to be without merit and void.

Now for the first time in the history of Arizona the Arizona Supreme Court by judicial fiat has taken the initiative and legislated on the subject matter. As stated by Justice Lockwood again in her dissenting opinion:

> "The question here involved is one of first impression, and one on which our legislature has never spoken through its statutory powers." (489 P. 2d 699 at 706.)

In the meantime millions of dollars have been invested by persons holding fee title in the development of exposed lands along the Colorado River.

While the doctrine of sovereign estoppel was properly raised before the Supreme Court of Arizona on rehearing (see paragraph III, Motion for Rehearing, App. 55, 56), the Court ignored the doctrine in its supplemental decision of April 13, 1972. Due to the misinterpretation of Supreme

Court Rule 46 that a joint petition for writ of certiorari could be filed by Arizona, Bonelli and Mohave County, in the preparation of questions raised in the petition in deference to the wishes of the Attorney General the question of sovereign estoppel was omitted; otherwise the question would have been presented because of its over all importance relating to titles along the Colorado River. However we now believe that it is of major concern and can be properly raised herein under this question.

It is respectfully submitted and urged that if there ever was a time and a factual situation when the Court should adopt and apply the doctrine of equitable estoppel to the sovereign, such time has arrived in the case at bar.

While in the past it has been held that the doctrine of estoppel does not apply to Arizona any more than the statute of limitations would apply *Kerby v. State ex rel. Frohmiller,* 62 Ariz. 297, 157 P. 2d 698 (1945), it appears to be the rule that this prohibition applies only to where the questions arise as to the preservation of public property and not where the state would assume to claim ownership of lands to which it had no record title either by grants from the United States or from individuals through deed or condemnation.

In the Attorney General's reply brief before the Arizona Court of Appeals an excellent opinion was furnished the court entitled "Memorandum of Law Points and Authorities Respecting the Rights of Arizona in the Colorado River" which was prepared and submitted to the Honorable George W. P. Hunt, Governor of Arizona, by Samuel White, Attorney at Law, under date of September 8, 1925. Arizona's asserted claim of ownership to lands along the Colorado River was therefore (if not previously) brought clearly to the attention of the executive department of Arizona. It is

clear the legislative department never saw fit to legislate along the lines of claimed ownership set forth in this Memorandum.

In 1935 the Attorney General at the request of the State Land Commissioner wrote an opinion in which it was held that Arizona did have certain title to the lands along the Colorado River and the State Land Department would have the authority under law to lease these lands subject to the limitations that the leases would not interfere with the powers of Congress to regulate commerce and navigation upon the Colorado River.

In the Attorney General's Reports of 1963, 1964 and 1967 attached as Exhibits B-1, B-2 and B-3 to Bonelli's motion for rehearing by the Arizona Supreme Court, the executive department as well as the legislative department of Arizona was informed that Arizona had certain rights to land along the Colorado River but that certain legislation was required to satisfy the conflict in titles (see statement by the Attorney General pp. 3, 4, response to petition for a writ of certiorari). It appears that the State Land Department of Arizona, under its authority to administer State lands (which would include all lands owned by Arizona along the Colorado River) never saw fit to exercise Arizona's claim of ownership until after the *Claridge* action had been commenced in the United States District Court.

Of course when the Bonelli action was filed in the Superior Court of Mohave County in 1962 (App. 3) Arizona did assert ownership to the Bonelli lands, but until such time (or long after 1925 and 1935) Arizona never made any real attempt to assert its title to any lands along the Colorado River. In other words Arizona has sat back, notwithstanding advice to the contrary, and allowed people whose title on lands adjacent to the Colorado River was derived from patents issued by the United States to develop

the lands either for agricultural, recreational or subdivision purposes and by the State's inaction it has lulled these title owners into a false sense of security and allowed them to proceed to develop and improve their lands at great expense and outlay of money without notice of the State's claim of ownership. Clearly the doctrine of equitable estoppel should apply and run against the State of Arizona.

The Ninth Circuit Court of Appeals in *United States v. Georgia-Pacific Company*, 421 F. 2d 92 (1970), held that the doctrine of estoppel does apply in certain instances to the government, particularly where the question involved is not that of preserving public lands but is an attempt to gain new title to lands. The Court also held that a party's silence will work an estoppel if, under the circumstances, he has the duty to speak (page 97) and this last statement is exactly what has happened in the case at bar. The Court further states on page 99:

> "Such governmental immunity from estoppel is an offshoot of sovereign immunity."

The Arizona Supreme Court in *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P. 2d 107 (1963; rehearing denied), abrogates and reverses the rule of governmental immunity from tort liability in the following language on page 109:

> "We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of *the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled.*" (Emphasis supplied.)

The same reasons that the Court gave in its decision for the abrogation of governmental immunity from tort liability, *supra*, therefore gives rise to the reason for the abrogation

of the rule of governmental immunity from the application of the rule of doctrine of equitable estoppel, particularly when the action is in equity, as it is in *Bonelli*, for it has also been held by the Arizona Supreme Court in *State v. Martin*, 59 Ariz. 438, 130 P. 2d 48 (1942) at 52:

> "This is an equitable action, and in equitable matters, in the absence of some statutory or constitutional provision to the contrary, *the general principles of equity should be applied to actions brought by the state as well as by a private party.*" (Emphasis supplied.)

And, more particularly, where there is an attempt by the State to gain new titles to lands and not protect public lands which it already owns by congressional grants under the Enabling Act or by deed.

It is respectfully submitted that it was the duty of the executive and legislative departments of Arizona to speak out by legislation or administrative action to claim and assert title to lands along the Colorado River and not wait until the record owners had expended large sums of money in the development and improvement of the lands. While it is admitted that the Bonelli land is not improved, yet it must be assumed that since Bonelli obtained title to the land it has paid state, county and school district taxes as fee owners and now the land (which at one time might have been considered worthless) is in the center of a highly developed recreational and subdivision area and therefore has become very valuable as shown by the whole record before the Court. Clearly, therefore, the doctrine of equitable estoppel should apply and be enforced against the State of Arizona.

It must be remembered we are not only dealing with Bonelli herein who has had its day in court, but there are involved numerous other owners of fee land along the

Colorado River many of whose source of title was acquired from and warranted by the Santa Fe Railroad, as well as the rights of lending agencies (both government and private) who have loaned large sums of money in development and improvement of land along the Colorado River, title insurance companies who have insured title guaranteeing these loans and title to these lands and a large tax base for Yuma and Mohave Counties, all of which rights have been swept under the rug by the two *Bonelli* decisions. These rights are substantial rights and this Court should not only bar the State of Arizona from asserting title to the same but should insist that if it does attempt to assert title to the land and improvements that it can do so only by affording these title owners their day in court and compensate them for the taking.

For these reasons alone we respectfully urge this Court (1) to invoke the doctrine of equitable estoppel against the State of Arizona and/or (2) to declare the decisions of the Arizona Supreme Court null and void as an attempt to retroactively confiscate the property of Bonelli and others without due process and without just compensation.

CONCLUSION

Although counsel of record undoubtedly will disagree as to the proper rule of law sought to be obtained from this Court, they will however unanimously agree that the questions presented herein relating to the change of ownership along the Colorado River resulting from the movement of the River from time to time and the works performed by the Federal government in the exercise of its powers under the commerce clause present one of the most important issues that has ever been before the courts of Arizona or this Court relating to land titles in Arizona. The confusion of land titles and the clouds placed thereon by the *Bonelli*

decisions and the resulting doubts as to the extent of public and Indian land ownership along the Colorado River as it flows through Arizona is without parallel in Arizona history. We are not only concerned with what has happened to the change of ownership as a result of the movement of the Colorado River and works performed by the Federal government in the past, but we are also concerned with the possible change of ownership resulting from works, particularly future channelization, on the Colorado River by the Federal government.

The broad questions presented herein not only affect titles to lands along the Colorado River but could affect titles to lands along all navigable streams in the nation where the channel of navigable streams has been changed by the Federal government in the exercise of powers under the commerce clause for reclamation, flood control, conservation, environmental and ecological reasons. It is a well-known fact that the Federal government through either its Corps of Engineers or Bureau of Reclamation is constantly exercising its rights and powers by constructing works to preserve and improve these navigable streams. Ownership established in the past by old types of works, such as levees, channels and dams, due to the passage of time have undoubtedly been stabilized; but what will the new works do in the future and what would they do under the *Bonelli* rule in the way of changing ownership and title? Regardless of the conclusion reached by this Court on this important question, its decision will have a direct impact on lands bordering other navigable stream systems throughout the nation.

The Arizona Supreme Court by the *Bonelli* decisions leaves it entirely up to conjecture and prophecy as to who is to determine the boundary lines fixed by the Court and by what means such boundary lines are to be determined.

The *Bonelli* decisions have, in effect, opened a wide corridor of state-owned land from at least Davis Dam in Mohave County down to the Mexican border south of Yuma. This wide corridor of state-owned land fixed by *Bonelli* has separated the Colorado River from former riparian land whether it be fee, Federal or Indian land and has, in effect, placed the Federal government in the ridiculous position of finding itself, as a result of its channelization works, without access to the River except across State land. Again it cannot be overemphasized that there is a complete lack of legitimate government function associated with this claimed ownership which, as pronounced in *Bonelli*, covers large areas of exposed land far away from the main thread of the Colorado River wholly unnecessary to provide for the public benefit and use access to the main channel of the navigable stream. Such conclusions reached by the Court in *Bonelli* emasculates the decisions of this Court and the intent of Congress in the enactment of the Submerged Lands Act, *supra*.

After almost fifty years of being advised by its legal departments of state of possible ownership to the lands bordering the Colorado River, Arizona—"the sleeping giant"—has suddenly awakened and now claims through the means of retroactive judicial legislation ownership of the land after it has been successfully and expensively developed by the owners thereof, without offering to compensate the owners for the taking thereof; and possibly also extending its claimed ownership to public and Indian lands bordering the Colorado River. As stated by Lundquist in his Conclusion (Arizona Law Review, Pet. App. I, page 342):

> "The problems faced by the *Bonelli* court were formidable and deserved more written explication than they received. The holding regarding post-Hoover Dam accretions and the definition of the high water mark

must be reconsidered either by the Supreme Court of Arizona or, in the case of lands vested in or *derived from* the federal government, by the federal courts. Allowing the 1938 (*sic,* 1935) high water mark to delineate the boundary between the state-owned bed and the uplands does violence to the accretion doctrine and hundreds of years of common law. Practically, the decision will cause confusion and hardship among landholders within Arizona along the Colorado River. Because the lands involved in *Bonelli* had previously been held by the upland owner and were then lost to the river by erosion, re-exposure of the lost acreage should result in an award to the upland owner by the doctrine of re-emergence. The cause of the re-exposure should be of no effect." (Lundquist emphasis.)

For the foregoing reasons, it is respectfully submitted that the two *Bonelli* decisions by the Arizona Supreme Court should be reversed and set aside and the Arizona Court of Appeals decision and the trial court's judgment affirmed, and this Court should hold that Arizona's title to the bed beneath the navigable stream of the Colorado River extends only to the banks of the main or navigable thread of the Colorado River, whether it be man-made or natural.

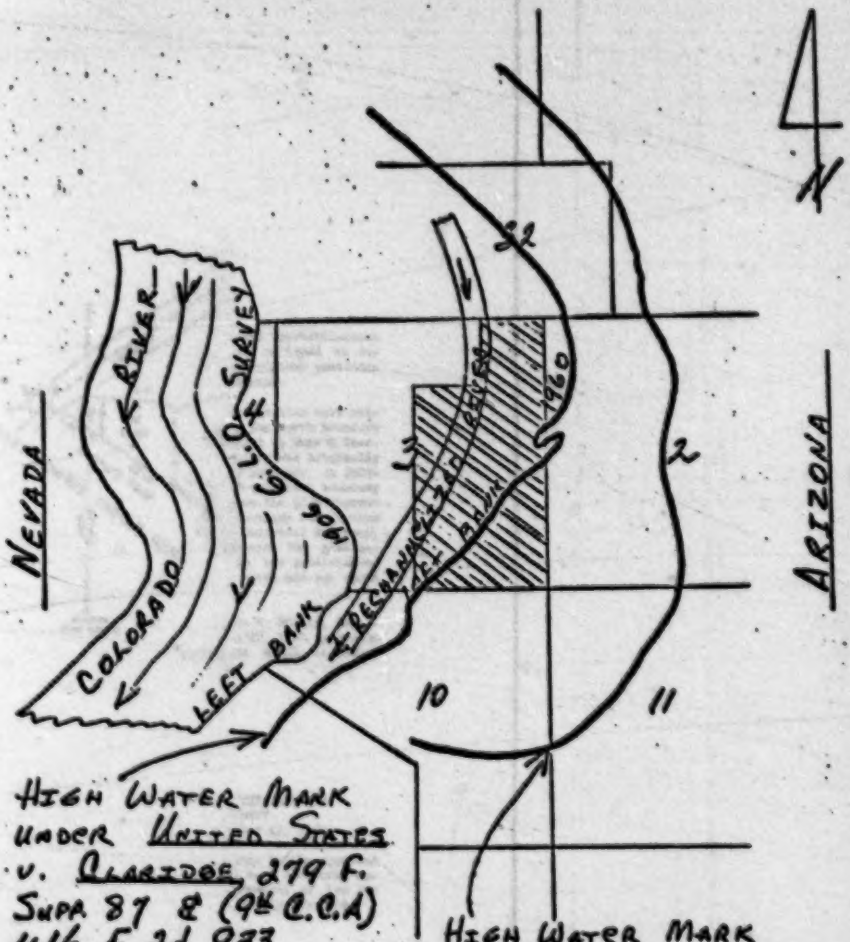
Respectfully submitted,

ELMER C. COKER
Luhrs-Central Building, Suite J
132 South Central Avenue
Phoenix, Arizona 85004
Attorney for Petitioner
Bonelli Cattle Company

LEONARD C. LANGFORD
Mohave County Attorney
Kingman, Arizona 86401
Attorney for Petitioner
County of Mohave

SUBJECT LAND -- PART OF SECTION 3, T. 19N., R. 22 W., G. & S. R.B. M.

▨ — SUBJECT LAND

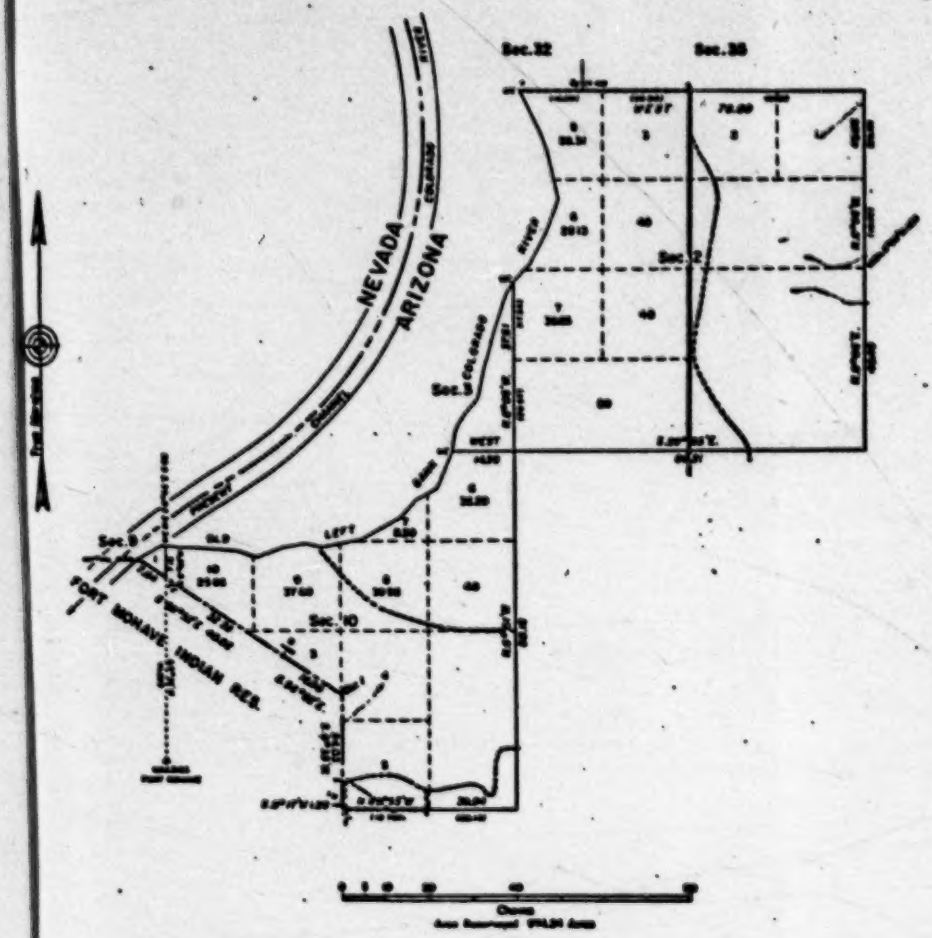


HIGH WATER MARK UNDER UNITED STATES v. CLAIRDGE, 279 F. SUPP 87 & (9TH C.C.A) 416 F. 2d 983

HIGH WATER MARK UNDER ARIZONA v. BONELLI CATTLE COMPANY, 495 P. 2d 1312

TOWNSHIP 19 NORTH, RANGE 22 WEST OF THE GILA AND SALT RIVER MERIDIAN, ARIZONA.

LIMITED DEPENDENT RESURVEY



This plat represents a retracement and reestablishment of the boundaries of secs. 2 and 10, designed to restore the corners thereof to their original positions according to the best available evidence.

The boundaries of the Ft. Mohave Reservation were originally surveyed by Army Engineers. The north boundary of the township was initially surveyed by Omar E. Cone, Deputy Surveyor, in 1872. The township was originally subdivided by J. J. Fisher, Deputy Surveyor, in 1905-06, including the resurvey of the reservation boundary and the north boundary, as shown upon the plat approved June 29, 1906. The reservation boundary was further resurveyed by Sidney H. Blout, U.S. Cadastral Engineer, under Group 149, Arizona, as shown upon the plat accepted January 23, 1931. Except as new subdivisions are shown hereon, the lottings and areas are as shown upon the township plat.

These surveys were executed by Elden V. Sibley, Cadastral Surveyor, from December 12 to 22, 1961, pursuant to supplemental special instructions dated September 15, 1961, for Group 355, Arizona.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D.C. October 12, 1962

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

Chief, Division of Engineering

55

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

vs.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

On Writ of Certiorari to the Supreme Court of Arizona

Brief for Amicus Curiae State of California on Behalf of Respondents

EVELLE J. YOUNGER,
Attorney General of the State of California,

JAY L. SHAVELSON,
Assistant Attorney General of the State of California,

WARREN J. ABBOTT,
JEROLD A. KRIEGER,
Deputy Attorneys General of the State of California,
600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
(213) 620-2683,
Attorneys for Amicus Curiae State of California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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INTEREST OF AMICUS CURIAE STATE OF CALIFORNIA

Petitioners have ably established the importance of this case to the State of Arizona. The same problem that exists in this case also appears along the California side of the Colorado River as well as in other navigable rivers in California and other States of the Union. The question of major importance to California is the ownership of the natural bed of a navigable waterway, such as the Colorado River, when it becomes dry due to the activities of the United States or any other lawful agency. Presently there are several lawsuits pending in

which California is claiming ownership of such lands made dry due to channelization of the Colorado River by the United States Bureau of Reclamation. Resolution of this matter will assist the states in settling these cases.

The lands along the Colorado River are becoming ever more popular and valuable for recreational uses. As this occurs, the question of land ownership becomes more important. The resolution of the legal questions by this Court raised in the instant case will aid California, as well as all states having similar problems with navigable rivers, to resolve expeditiously these title questions. In this way there may be orderly development, including preservation of these vast recreational areas.

STATEMENT OF THE CASE

The following is a summary of the facts in the instant case as stated in the Agreed Statement of Facts and Issues. (Appendix pp. 6-18.)

This is a quiet title action to the land described as follows:

> Lot 1, the S ½ NE ¼ and the SE ¼ of Section 3, Township 19 North, Range 22 West, Gila and Salt River Meridian.

Petitioner, Bonelli Cattle Co., acquired title through mesne conveyances from Santa Fe Pacific Railroad Company. Santa Fe received title from a United States Patent dated November 5, 1910, pursuant to Act of Congress July 27, 1866 "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast . . ." At the time of the grant to Santa Fe, the property in question *was not riparian land along the Colorado River.*

The Colorado River between 1906, the date of the original survey of said lands, and 1959, the date of channelization of the river, moved eastward through natural causes. By 1954, the river covered most of the property here involved. During the winter of 1959 and the early part of 1960, the United States Bureau of Reclamation channelized and stabilized the Colorado River, thereby confining the river to the western part of the land in question. For a pictorial representation of the position of the river in 1906, 1960 and after channelization, see petitioner's brief page 54. The channelization of the Colorado River left the land in question dry and usable. The present controversy then arose.

The Supreme Court of Arizona held that the part of the former riverbed made dry by the actions of the Bureau of Reclamation belonged to the State of Arizona. *State v. Bonelli Cattle Co.*, 489 P.2d 699 (1971), *rehearing denied*, 495 P.2d 1312 (1972).

QUESTIONS PRESENTED

While the petitioners contend that there are six questions before this Court, amicus curiae State of California contends that they may be summarized as follows:

1. When a navigable river is rechannelized leaving a portion of the natural bed dry, does the state or the riparian owner have title to the former bed?

2. Did the closing of Hoover Dam fix the position of the Colorado River for boundary purposes?

The position of the State of California is that the state retains title to lands uncovered by channelization, and that the closing of Hoover Dam did *not* fix the position of the river for boundary purposes.

ARGUMENT

INTRODUCTION

Each state holds the lands underlying navigable waters in trust for all the people of that state, and subject to the navigational servitude retained by the federal government. The state's trust encompasses the traditional uses of commerce, navigation and fisheries as well as ownership of the bed. The nature of this trust in California has recently been reiterated in *Marks v. Whitney*, 6 Cal. 3d 251, 259-60, 491 P.2d 374 (1971). In *Marks*, the Court noted "the public uses to which tidelands are subject are sufficiently flexible to encompass changing needs." While *Marks* spoke of the tidelands trust, the same trust is applicable to all lands underlying navigable waters. *Illinois Central RR v. Illinois*, 146 U.S. 387, 436-37 (1892). This trust is a restriction upon the state's use of such lands even though they have been reclaimed and are dry. *See City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482-83, 476 P.2d 423 (1970).

If, as we contend, the State of Arizona retains title to the subject lands, said title is held subject to the public trust. These lands, which are adjacent to the river are most useful to provide access to the river for boating, fishing, or other recreational purposes, as well as possible uses relating to commerce. Therefore, the state does not own these lands merely for the purpose of having a bed for a river, but for all trust purposes.

The location and inventory of the public trust lands is essential to their proper administration. This case deals precisely with this problem, namely the application of principles concerning ownership of beds of navigable rivers when an artificial change has been made.

The artificial change in this case was the narrowing of the flowing stream by dredging and channelization by the United States Bureau of Reclamation in exercise of the federal navigational servitude. California submits that the rules applicable to ownership in the event of avulsion or artificial change in the location of a river bed are well established and applicable here.

I

The Arizona Court Reached the Proper Conclusion Concerning River Boundaries When the Course of the River Moves

Petitioners make much of the fact that the Arizona Supreme Court apparently used state, rather than federal laws, to determine this case. However, the main question, *i.e.*, who owns the dry riverbed after channelization, is answered the same way whether federal law or state law is applied. In either situation the State of Arizona would be the owner of the land in dispute. *See* Memorandum for the United States as amicus curiae filed January 3, 1973.

A. Common Law

Before discussing the legal principles concerning channelization of the river in the instant case, it is necessary that the legal definition of, and distinctions between various terms be understood. These terms are equally applicable to federal and state rules.

The term "*accretion*" denotes the process whereby the area of littoral or riparian land is increased by the gradual and imperceptible deposit of sand, soil or other solid material upon the margin of the water. Although the word "*alluvion*" (sometimes spelled "alluvium") is usually applied to the deposit itself, as distinguished

from the act, it is often used synonymously with "accretion."

"Erosion," or the converse of accretion, is the gradual wearing away or loss of land bordering on a body of water or watercourse by the action of the water.

"Reliction" (sometimes "dereliction") is the process whereby land that had been covered by water becomes uncovered or exposed by the imperceptible recession of the water (*i.e.*, the lowering of the water level); although frequently used interchangeably with "alluvion," the term "reliction" in its precise legal meaning refers to land uncovered by gradual exposure rather than land building up on the bottom, shore or bank. Many authorities hold that the recession must be permanent in order to constitute reliction.

"Submergence," or the converse of reliction, denotes the disappearance of land under water and the formation of a navigable body of water over it.

Accretion, erosion, reliction and submergence generally all involve what are legally characterized as "gradual and imperceptible" changes. They are distinguished from *"avulsion,"* which is (1) the more rapid, perceptible and often violent removal of or addition to land due to the action of water, or (2) the sudden natural or artificial change in the bed or course of a river.

Regarding definitions of these terms generally, *see:* 56 Am. Jur. Waters §§ 476, 477, pp. 891-95; III *American Law of Property* (Casner ed. 1952) § 15.26, pp. 855-56; *Black's Law Dictionary* (Rev. 4th ed. 1968) 36-37, 102, 173-74, 529, 530, 647, 1455, 1594; *Ballentine's Law Dictionary* (3d ed. 1969) 14, 64, 116, 339, 414, 1085, 1229; 6 Powell, *The Law of*

Real Property (3d ed. 1939) § 983, pp. 607-11; 5A Thompson, *Commentaries on the Modern Law of Real Property* (1957 Repl.) §§ 2560-63, pp. 599-619; 4 Tiffany, *The Law of Real Property* (3d ed. 1939) § 1219, pp. 613-15.

The rules of law relating to boundary changes when a river changes its course are stated in *Arkansas v. Tennessee*, 246 U.S. 158, 173 (1918).

> ". . . It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. New Orleans v. United States, 10 Pet. 662, 717; Jefferis v. East Omaha Land Co., 134 U.S. 178, 189; Nebraska v. Iowa, 143 U.S. 359, 361, 367, 370; Missouri v. Nebraska, 196 U.S. 23, 34-36."

Applying the above stated rules of law to the instant situation, it is apparent that the Supreme Court of Arizona reached the proper conclusion. As expressly admitted by the petitioners, the actions of the United States Bureau of Reclamation caused an *avulsive* change along the bed of the Colorado River. (Pet. Brief p.

28.) Since an avulsive change does not alter boundaries, the boundary of the state owned land beneath the Colorado River remained in the same position as before the works of the Bureau.

B. The Results Reached by the Arizona Supreme Court Are the Same as Would Have Been Reached Applying Federal Law

Even applying federal law to the instant case, as argued by the Solicitor General, the State of Arizona would retain title to the land in question. The case of *Marine Ry. Co. v. United States*, 257 U.S. 47 (1921), is directly in point. The land in that case "lay below low water mark until it was filled in by the United States in 1910-1912 by dredging from the bottom of the river and depositing the material on the other side of a riprap wall built on the river bed." The facts are more thoroughly discussed in *Marine Ry. & Coal Co. v. United States*, 265 Fed. 437 (D.C. Cir. 1920). The United States, by grant from Maryland creating the District of Columbia, received title to the Potomac River. The Court of Appeal specifically stated: "The rule is without exception that, so long as the sovereign remains owner of submerged soil, it retains the fee of the soil reclaimed. [Citation.]" In the *Marine Ry. & Coal Co.* case, the dredging operation took place between 1910-1912. In the instant case the period was even shorter, *i.e.*, late winter of 1959 to early 1960. Thus, under federal law, the land in question would belong to the State of Arizona.[1]

---

[1]Previously, this Court in *Barney v. Keokuk*, 94 U.S. 324, 337-38 (1876), stated, regarding "lands reclaimed by artificial means," that "by the common law, as before remarked, such additions to the land on navigable waters belong to the crown." However, this Court left it for the several states to decide whether it would "be safe to change these doctrines . . ." Arizona, like California, has decided not to change this rule.

II

The Arizona Supreme Court Decision Herein Is Consistent With the Court of Appeals Decision in United States v. Claridge

Petitioners allege the existence of three conflicts between the Arizona Supreme Court Decision and *United States v. Claridge*, 279 F. Supp. 82 (D.C. Ariz. 1966), aff'd 416 F.2d 933 (9th Cir. 1969). They contend that inconsistencies arise in the definition of "high water mark," in the legal effect of dams, and in the legal effect of rechannelization of a riverbed. We submit that none of these inconsistencies exist.

Both the Arizona Court and the Claridge Court use the same definition of "high water mark". Both cite the definition in *Howard v. Ingersoll*, 54 U.S. 410 (13 How. 381) (1851), that the ordinary high water mark is that line reached during ordinary high flow, but not during the flood stages of a river. *See United States v. Claridge, supra*, 416 F.2d 933 (9th Cir. 1969); *State v. Bonelli Cattle Co.*, 495 P.2d 1312, 1314 (1972).

The Court in *Claridge* held that the closing of Hoover Dam had no effect on land ownership along the river. The *Bonelli* Court however, held that "the condition of the Colorado River at or immediately prior to its control by artificial works is the appropriate time for determining the right of the parties, although, of course, evidence of the river's condition thereafter may be illuminating." The reason for this appears in the statement of facts in the Court's first opinion (*State v. Bonelli Cattle Co.*, 489 P.2d 699, 701 (1971)), where the court stated that there had been no significant changes in the river between the closing of the

dam and the channelization by the United States. The *Claridge* Court relied on *Beaver v. United States*, 350 F.2d 4, 11 (9th Cir. 1965). The *Beaver* case was concerned with the effects of the Laguna Dam on the Colorado River. In that case, the trial court "found the building of the dam was an insignificant factor in the subsequent accretion." These three cases may be easily reconciled by adopting a reasonable position which amicus curaie State of California supports and which is implied in the *Beaver* case. Generally, the closing of a dam only affects the flow of a river and keeps it from flooding. The closing of the dam does not cause the river to change its course, and therefore the closing of itself does not cause avulsive changes. If the meanderings of a river still occur, by reason of normal accretion and erosion, the ownership of the littoral property changes accordingly. This follows the normal presumption that changes in a river are gradual and imperceptible. *Hall v. Brannan, etc. Co.*, 158 Colo. 201, 405 P.2d 749, 750 (1965); *Dartmouth College v. Rose*, 257 La. 533, 133 N.W. 2d 687, 689 (1965); *III American Law of Property, supra*, § 15.29, p. 862. However, when as in property close to a dam, it can be shown by evidence that the closing of the dam caused a relatively sudden and perceptible change in the course or bed of the river, the closing then should be considered a man-made avulsive change. In the instant case, there is nothing in the record to show that the closing of Hoover Dam caused the Colorado River to alter its course or bed in the vicinity of the property here involved.

The third conflict between the two cases alleged by petitioner is non-existent, that is, the question of the effects of channelization or dredging. While the language

in the *Claridge case*, quoting from *Beaver v. United States, supra*, recognizes that dredging does not change the "accretion doctrine," the *Bonelli* Court held that the changes were *avulsive*. That the change in the instant case was avulsive is conceded by petitioners at page 28 of their brief. As noted above, this Court has held that dredging and filling similar to that which occurred in the instant case does not change boundaries along a river. *Marine Ry. Co. v. United States, supra.*

III

Petitioners' Other Contentions Are Without Merit

A. The Submerged Lands Act Is Immaterial to the Instant Case

That the various states held title to the lands underlying navigable waters had been long established in the United States before the Submerged Lands Act. (67 Stat. 29.)

> ". . . The act confers rights in three categories of cases: lands under inland navigable waters, tidelands (lands between high-and low-water marks), and lands under the open sea. Insofar as the first two categories are concerned, the act is merely declaratory of existing law and gives legislative expression to the doctrines enunciated by the Supreme Court in a long line of decisions beginning with Martin v. Waddell, 16 Pet. 367 (41 U.S. 1842), and Pollard's Lessee v. Hagan, 3 How. 212 (44 U.S. 1845)."
>
> 2 Shalowitz, *Shore and Sea Boundaries*, 455 (1964).

Furthermore, there is no contention made by the private parties that the original United States patent specifically included the riverbed. In fact, the Colorado River

was some distance from the lands at the time of the patent.

B. There Is No Taking of Private Property

The property in question is a former riverbed owned by the State of Arizona in its sovereign capacity. As with uplands bordering upon tidelands, they are subject to "considerable control" by the state. *See Hughes v. Washington*, 389 U.S. 290, 294, n.3 (1967). The fact that access to the water is cut off by the lawful act of the United States in furtherance of its powers over navigable waters has long been held not to constitute a taking. *See Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912). It should be noted that at the time of the original patent to Santa Fe from the United States, the property in question was not littoral to the Colorado River.

Justice Lockwood in her dissent, 489 P.2d 699, 703-710, bases her conclusion that there is a "taking" on the fact that the plaintiffs, or their predecessor, once owned the land in question and that they have lost their riparian rights. There are at least three rebuttals to this reasoning. First, following petitioners' logic, if the state wished to construct a harbor, recreational facilities or other structures for trust purposes by filling in part of the river, the state would immediately lose title to the land and thus be prevented from exercising the trust. Secondly, if the river had been rechannelized on to lands other than those of petitioners, the former owners of those lands would be riparian, and petitioners would, as in the instant case, not be riparian. Thirdly, the loss of riparian rights, if there was any, was caused by the action of the United States and *not by the State of Arizona*. This situation was specifically

discussed in *United States v. Rands,* 389 U.S. 121, 123 (1967), where this Court stated:

> ". . . Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, South Carolina v. Georgia, 93 U.S. 4 (1876), or otherwise impair or destroy a riparian owner's access to navigable waters, Gibson v. United States, 166 U.S. 269 (1897); Scranton v. Wheeler, 179 U.S. 141 (1900); United States v. Commodore Park, Inc., 324 U.S. 386 (1945), even though the market value of the riparian owner's land is substantially diminished."

On page 20 of petitioners' brief, they appear to argue that since the land is *now* suitable for agricultural or development purposes, it meets the test of uplands as defined in *Oklahoma v. Texas,* 260 U.S. 606, 628-29 (1923). That case, however, involved the boundary between Texas and Oklahoma along the Red River. The case only incidentally discussed the question of avulsion or accretion. The concern in that case was the bank of the Red River, as defined in the Treaty of 1819 (Stat. 252). The Court merely held that where a river is in a state of nature, the bank thereof is located waterward of lands suitable for agriculture. The State of California agrees that some eleven years after the Colorado River moved from these lands by a man-made avulsive change, they may *now* meet that definition of uplands. This, however, is not the question before this Court. What must be determined is whether these lands were below the high water mark of the river in its *last natural position* prior to the avulsive change. In other words, were these part of the bed of the Colorado River in 1959, before channelization? The State of California submits that they were.

Conclusion

The beds of navigable rivers are owned by the respective states in their sovereign capacities. As the river bed changes slowly and imperceptibly so does the boundary between the adjacent property and the state owned bed. However, when through natural or artificial causes the bed is altered suddenly, the boundary of the old bed remains as it was before the change.

In the instant case, the rechannelization of the Colorado River was an avulsive change and therefore there was no change in the ownership of the old bed. The State of Arizona retained title to the old dry bed as it existed just prior to channelization. This was the holding of the Supreme Court of Arizona and should be affirmed by this Court.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

JAY L. SHAVELSON,
Assistant Attorney General of the State of California,

WARREN J. ABBOTT,
JEROLD A. KRIEGER,
Deputy Attorneys General of the State of California,

Attorneys for Amicus Curiae State of California.

SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-397

Supreme Court, U. S.
FILED
JUN 18 1973
MICHAEL RODAK, JR., CLERK

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Arizona

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BRIEF OF RESPONDENTS

GARY K. NELSON
THE ATTORNEY GENERAL OF ARIZONA

By: Dale R. Shumway
Special Assistant
64 East Broadway
Tempe, Arizona 85282
Attorney for Respondemts

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By: Dale R. Shumway
Special Assistant
64 East Broadway
Tempe, Arizona 85282
Attorney for Respondents

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Respondents.

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BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The decision under review arose on a quiet title complaint filed in the Superior Court of the State of Arizona in and for the county of Mohave. (App. 3) Pursuant to stipulation, the

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The decision under review arose on a quiet title complaint filed in the Superior Court of the State of Arizona in and for the County of Mohave. (App. 1) Pursuant to stipulation, the

matter was transferred to the Pinal County Superior Court and thereafter an Agreed Statement of Facts and Issues (App. 6) was entered into between the parties and the matter was submitted to the Court for its decision. Judgment was entered quieting title to the petitioner and thereafter an appeal was taken to the Court of Appeals of the State of Arizona. The Court affirmed the judgment of the trial Court and a Petition for Review was filed with the Supreme Court of Arizona. The Supreme Court reversed and directed the trial Court to enter judgment quieting title in the State of Arizona.

STATEMENT OF FACTS

The petitioner BONELLI CATTLE COMPANY claims to be the record owner of real property situate in Mohave County, State of Arizona, described as:

matter was transferred to the Final County Superior Court and thereafter an Agreed Statement of Facts and Issues (App. 5) was entered into between the parties and the matter was submitted to the Court for its decision. Judgment was entered quieting title to the petitioner and thereafter an appeal was taken to the Court of Appeals of the State of Arizona. The Court affirmed the judgment of the trial Court and a Petition for Review was filed with the Supreme Court of Arizona. The Supreme Court reversed and directed the trial Court to enter judgment quieting title in the State of Arizona.

STATEMENT OF FACTS

The petitioner BONELLI CATTLE COMPANY claims to be the record owner of real property situate in Mohave County, State of Arizona, described as:

> Lot One (1); the South Half of the Northeast Quarter (S1/2NE1/4) and the Southeast Quarter (SE1/4) of Section Three (3), Township Nineteen (19) North, Range Twenty-two (22) West of the Gila and Salt River Base and Meridian.

Its source of title is a warranty deed from Harry E. Miller and Orpha S. Miller, his wife, dated the 12th day of August, 1955. (App. 14) The chain of title prior to this deed extends to a patent issued by the United States, dated November 5, 1910, to the Santa Fe Pacific Railway Company. (App. 16)

In an effort to establish the location of the subject property in relation to the Colorado River and in relation to movements of that river, several maps and photographs were attached to the Agreed Statement of Facts and Issues presented to the trial Court. (App. 6) These maps and photographs were not included in the appendix but are a

Lot One (1), the South Half of the Northeast Quarter (S1/2NE1/4) and the Southeast Quarter (SE1/4) of Section Three (3), Township Nineteen (19) North, Range Twenty-two (22) West of the Gila and Salt River Base and Meridian.

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part of the record before this Court.

The earliest plat showing the location of the river in relation to the subject property is a plat dated 1902 and designated as "Plan Profile of Colorado River from Black Canyon, Ariz. - Nev. to Arizona - Sonora Boundary, Sheet C". This map is attached to the Agreed Statement of Facts and Issues (App. 6) as Exhibit "K". As a convenience to this Court, we have reproduced a portion of this exhibit and have inserted it herein as Figure 1 found on page 5.

The original survey of the subject land by the Surveyor General's Office of the United States Department of the Interior was made December 24, 1905 to January 24, 1906. A copy of this survey is attached to the Agreed Statement of Facts and Issues as Exhibit "B".(App. 15) Inserted herein as Figure 2 found on page 6 is a reproduction of a portion of that

part of the record before this Court.

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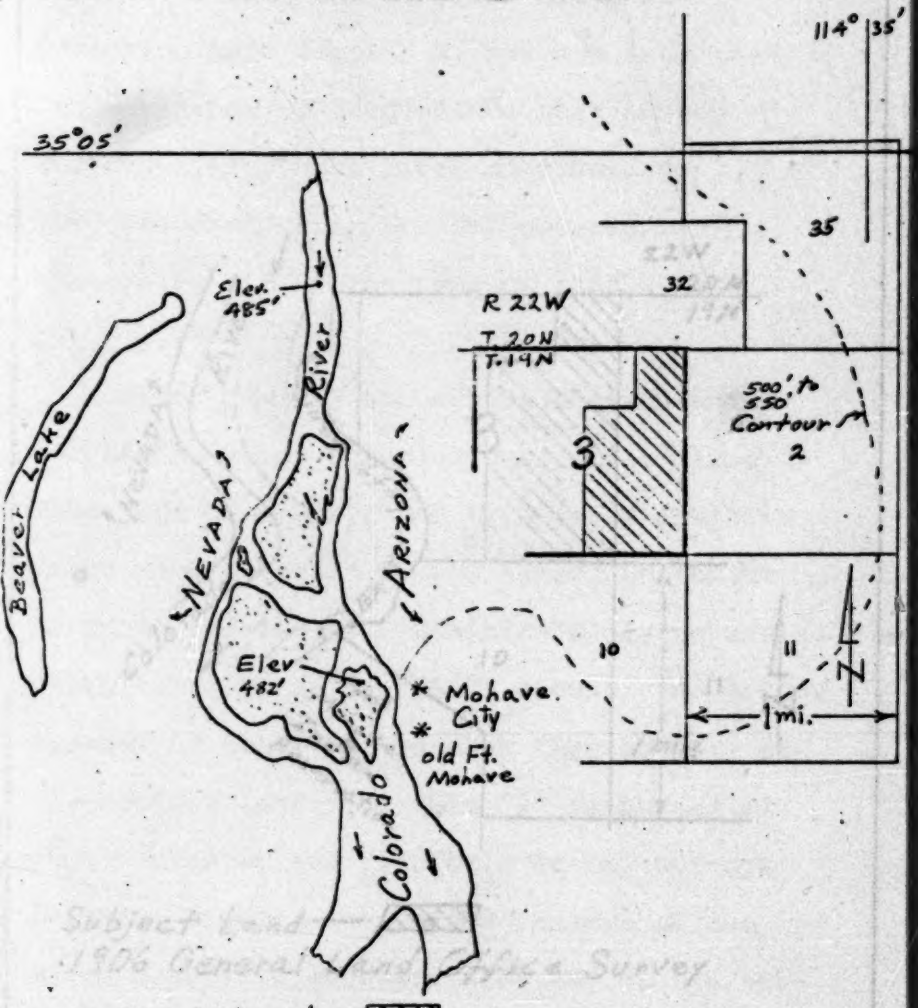
15) Inserted herein as Figure 2 found on page
6 is a reproduction of a portion of that

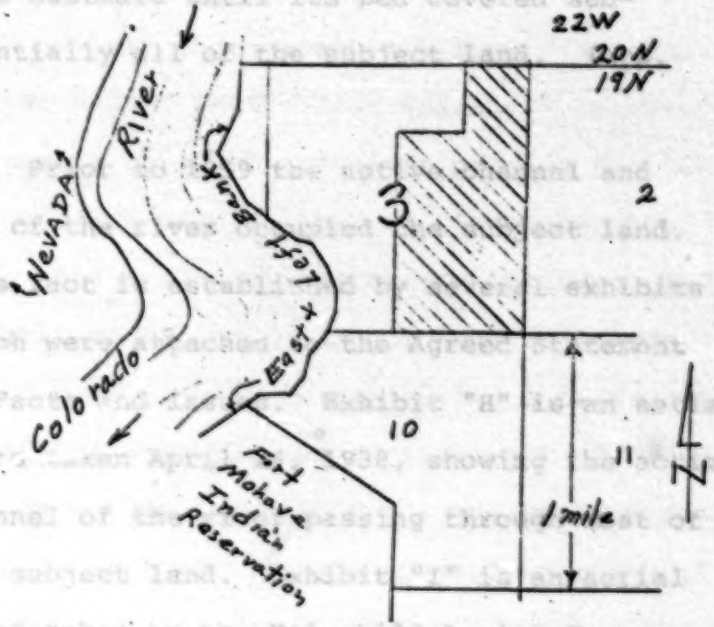
Sec. 3 - 19N, 22W
Subject Land in Relation to
1902 River Channel.



Subject Land — ▨
1902 Geological Survey

Fig. 1. Exhibit K

Sec. 3 - 19N, 22W
Subject Land in Relation to
1906 River Channel



Subject Land —
1906 General Land Office Survey

Fig. 2. Exhibit B

3
10
11
1 mile

exhibit showing the Colorado River encroaching into Section 3, but not into the subject land. Subsequent to that survey and conveyance, the river continued to move eastward until its bed covered substantially all of the subject land. (App. 10)

Prior to 1959 the active channel and bed of the river occupied the subject land. This fact is established by several exhibits which were attached to the Agreed Statement of Facts and Issues. Exhibit "H" is an aerial photo taken April 24, 1938, showing the active channel of the river passing through most of the subject land. Exhibit "I" is an aerial photo taken by the Fairchild Aerial Surveys in 1942, showing the active channel of the river occupying substantially all of the subject land. Exhibit "J" is the Davis Dam, Quadrangle-Nevada-Arizona-California 15 minute series topographic map produced by the United

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States Department of the Interior Geological Survey in 1950 showing the location of the river in the area of the subject land. Substantially all of the subject land is shown on each of these exhibits to be within the active channel of the river.

In 1959 under authority from Congress, the Bureau of Reclamation undertook to rechannel a reach of the river passing through the subject land. (App. 8) In connection with this rechannelization, a topography map identified as "Sheet No. 5, Lower Colorado River Topography" was prepared. This map was submitted with the Agreed Statement of Facts and Issues as Exhibit "E-1", and was accompanied by a letter explaining certain parts of the map. A portion of this map showing the location of the real property in relationship to the river is included herein, and is designed as Figure 3 found on page 9. It will be noted from Figure 3 that in 1959 most of

State Department of the Interior Geological Survey in 1950 showing the location of the river in the area of the subject land. Substantially all of the subject land is shown on each of these exhibits to be within the active channel of the river.

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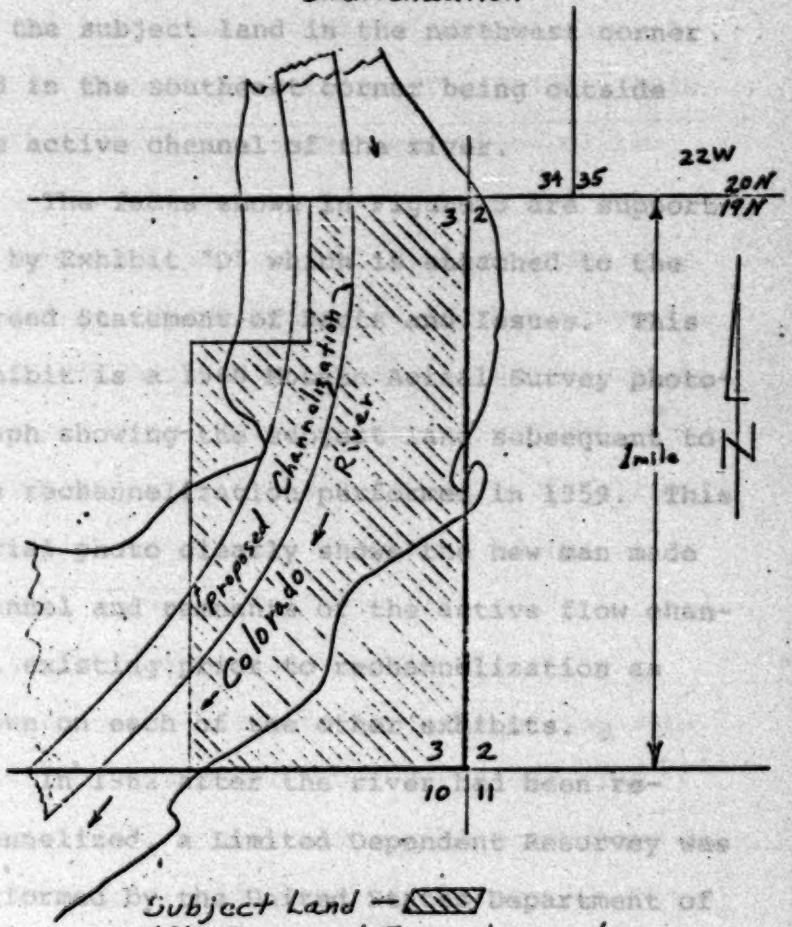
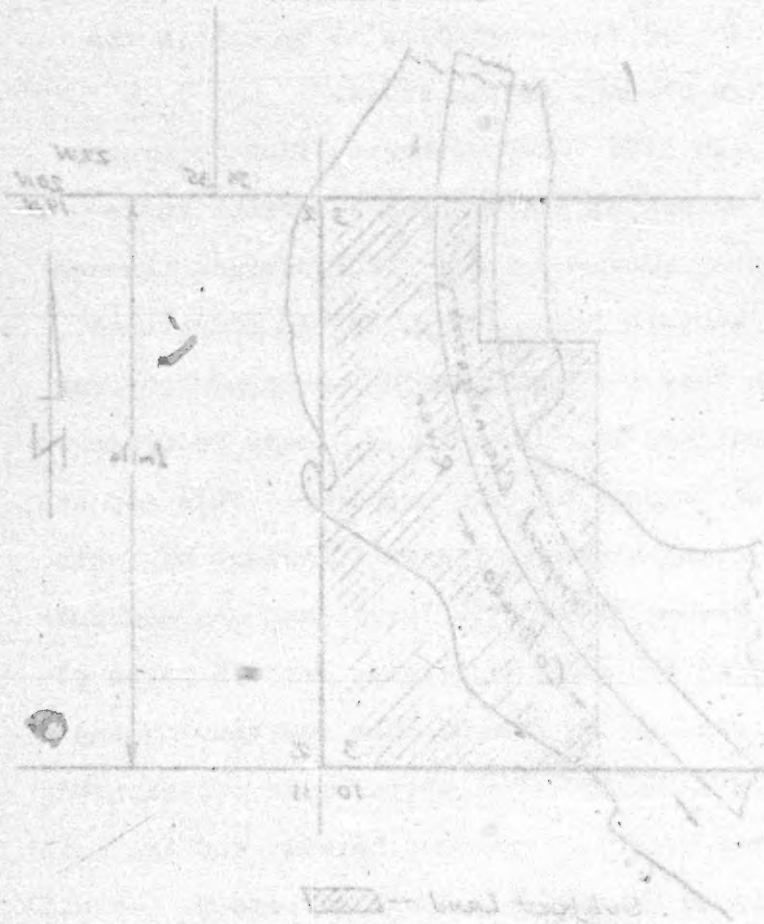
Sec. 3 - 19N, 22W
Subject Land in relation to 1959
River Channel before and after
Channelization



Subject Land —
1960 Revision of Topography map by
Office of River Control, Bur. of Recl.

Fig. 3. Exhibit E-1



the subject land was within the active channel of the river prior to the re-channelization, with only a small portion of the subject land in the northwest corner and in the southeast corner being outside the active channel of the river.

The facts shown in Figure 3 are supported by Exhibit "D" which is attached to the Agreed Statement of Facts and Issues. This exhibit is a 1960 Mosaic Aerial Survey photograph showing the subject land subsequent to the rechannelization performed in 1959. This aerial photo clearly shows the new man made channel and remnants of the active flow channel existing prior to rechannelization as shown on each of the other exhibits.

In 1962 after the river had been re-channelized, a Limited Dependent Resurvey was performed by the United States Department of Interior acting through the Bureau of Land Management. (App. 10) The result of this

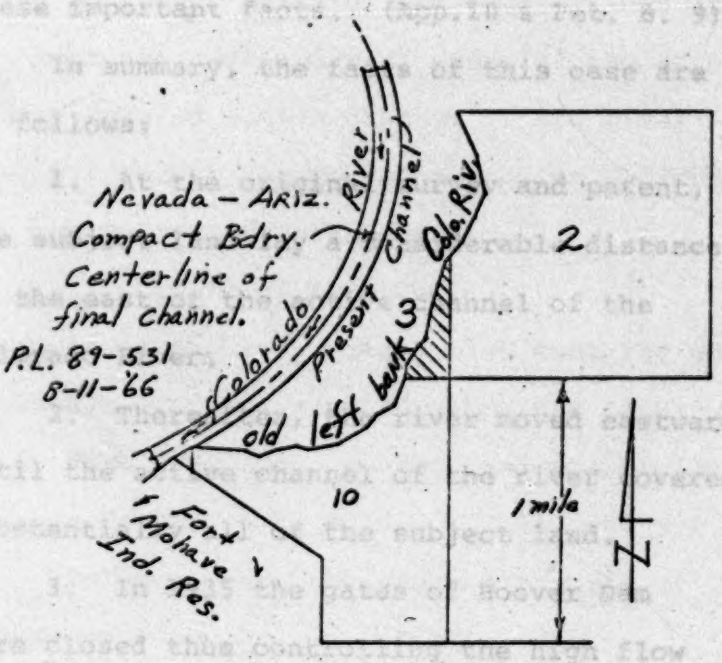
the subject land was within the active channel of the river prior to the re-channelization, with only a small portion of the subject land in the northwest corner and in the southeast corner being outside the active channel of the river.

The facts shown in Figure 3 are supported by Exhibit "B" which is attached to the Agreed Statement of Facts and Issues. This exhibit is a 1969 Mosaic Aerial Survey photograph showing the subject land subsequent to the rechannelization performed in 1959. This aerial photo clearly shows the new man made channel and remnants of the active flow channel existing prior to rechannelization as shown on each of the other exhibits.

In 1962 after the river had been rechannelized, a Limited Dependent Resurvey was performed by the United States Department of Interior acting through the Bureau of Land Management. (App. 19) The result of this

survey was submitted with the Agreed Statement of Facts and Issues as Exhibit "G", and a portion of that exhibit is included herein as Figure 4 found on page 12 and at page 55 of Petitioner's Brief. This exhibit shows the rechannelization of the river and the new boundary which had been approved by the Boundary Compact Commission of Arizona and Nevada. It further shows the "old left bank of the Colorado River" which existed prior to the rechannelization. This "old left bank of the Colorado River" line is slightly east of the left bank of the river channel shown on Exhibits "D", E-1", "I" and "J". These exhibits however all clearly show that the river in the area of the subject land has moved great distances from the original survey and since conveyances to Petitioner's predecessor in interest. The exhibits fail however to establish the manner

Sec. 3-19N, 22W
Subject Land in relation to present (Since 8-11-66) location of Colorado River.



Subject Land — ▨
1962 Resurvey by Bur. of Land Management.

Fig. 4. Exhibit G.

2
3
10
Mile
14

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In summary, the facts of this case are as follows:

1. At the original survey and patent, the subject land lay a considerable distance to the east of the active channel of the Colorado River.

2. Thereafter, the river moved eastward until the active channel of the river covered substantially all of the subject land.

3. In 1935 the gates of Hoover Dam were closed thus controlling the high flow of the river.

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2. Thereafter, the river moved eastward until the active channel of the river covered substantially all of the subject land.

3. In 1935 the gates of Hoover Dam were closed thus controlling the high flow of the river.

4. In 1959, the Bureau of Reclamation rechannelized the river in the area of the subject land resulting in part of said land being left dry and outside the active channel of the river.

5. Today parts of the subject land lie on both the east and west sides of the artifically created active channel of the river established by the rechannelization performed by the Bureau of Reclamation.

STATUTES INVOLVED

It is the Respondents view that the only statutes involved are the Submerged Lands Act, 43 U.S.C. 1301, et seq. and the Boulder Canyon Project Act, 43 U.S. C. 617, et seq.

Following are the pertinent parts of these statutes:

Submerged Lands Act, Section 1311 of U.S.C.

> "(a) It is determined and declared to be in the public interest that

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"(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof."

Boulder Canyon Project Act, Section 617 of 43 U.S.C.

"Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain.

For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States . . . the Secretary of the Interior . . . is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or

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"Boulder Canyon adequate to create a storage reservoir . . . and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam . . ."

QUESTIONS PRESENTED

1. Whether the ordinary high water mark and bed of a navigable river is established by and includes all of the area below the line created by the water during the usual high flow stage of the river's annual cycle.

2. Whether changes in the flow pattern of the Colorado River caused by the construction of dams and rechannelization of the stream bed by the United States, changes or alters the ordinary high water mark for purposes of changing or altering the ownership of exposed lands resulting from the construction of such works.

SUMMARY OF ARGUMENT

The brief of Petitioner suggests several issues and questions which confuse

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The belief of Petitioner suggests several issues and questions which confuse

An otherwise simple factual and legal situation. The Arizona Supreme Court swept aside most of these same issues when they were presented to it.

By its decisions, (State v. Bonelli, 489 P29 699 & 495 P2d 1312) the Arizona Supreme Court held:

1. At statehood, Arizona became the owner of that portion of the bed of the Colorado River lying east of the center line of the river and below the ordinary high water mark.

2. That without the presence of facts to establish the manner of improvement of a river, all changes in a bed of a navigable stream are presumed to be the result of erosion and accretion.

3. That where the bed of the river has shifted by erosion and accretion, the State continues to own the bed of the stream, even though the stream after the change covers lands which

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were formerly privately owned.

4. That where the bed of a navigable stream shifts by avulsive action, or is altered by man-made changes, the State continues to own the land area occupied by the bed in its last natural position.

The Arizona Supreme Court's decision is supported by the holdings in all other Courts which have considered these issues. The doctrine is sound and recognizes the "equal footing doctrine" under which Arizona became a State.

ARGUMENT

I. AT STATEHOOD, ARIZONA RECEIVED TITLE TO THE LANDS WITHIN THE BED OF THE NAVIGABLE COLORADO RIVER LYING EAST OF THE THREAD OR CENTER LINE OF THE STREAM AND BELOW THE ORDINARY HIGH WATER MARK.

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reach of the river involved in this action. Even though the river is not today navigable in the sense of navigation for commerce, the river still remains a navigable river. The Court, in United States v. Appalachian Electric Power Co., 311 U.S. 377, 408, 61 S. Ct. 291, reh. den., 312 U. S. 712, 61 S. Ct. 548, after citing numerous other cases, stated that once a river is found to be navigable, it remains so. In addition, it is well to note that Congress in the Boulder Canyon Project Act, 45 U.S. Stat. 1057, 43 U.S.C. Sec. 617, et seq., declares that the Colorado River in the area of the subject land is a navigable river.

It is a well established principle of law, that upon admission into the Union a State acquires title to the beds of navigable rivers between the ordinary high water marks, or where a river forms a

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boundary between two states, between the ordinary high water mark on the side of the state and the center of the river. Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 11 L.Ed. 565; Shively v. Bowlby, 152 U.S. 1, 43, 14 S.Ct. 548; Martin, et al v. Waddell, 16 Pet. 410; Hardin v. Jordan, 140 U.S. 371; Kansas v. Colorado, 206 U.S. 46, 49; Tyson v. State of Iowa, (8th Cir., 1960) 283 F.2d 802; 56 Am Jur. Waters, Sec. 453; and 65 C.J.S. Navigable Waters, Sec. 92.

Although there have been no previous Arizona or Federal cases construing the rights of Arizona to lands underlying the navigable Colorado River, all of the United States Supreme Court cases considering other States' title to such lands within the bed of other rivers have held in favor of the States on the basis of "equal

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Congress by the Submerged Lands Act of 1953, 67 U.S. Stat. 29, 43 U.S.C. Sec. 1301, et seq. confirmed and recognized the respective States' title to land beneath

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Although neither the Arizona or Federal Courts have construed this section of the Act, it has been construed by the Supreme Court of California. In People v. Hecker, Cal. App. 1960, 4 Cal. R. 334, the Court stated that the Submerged Lands Act was merely a declaration that title to navigable waters had already vested in the respective States

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II. THE BED OF THE COLORADO RIVER IN ITS NATURAL STATE INCLUDED ALL OF THE AREA BELOW THE ORDINARY HIGH WATER MARK WHICH IS THE LINE CREATED BY THE WATER DURING THE NATURAL ANNUAL HIGH FLOW STAGE OF THE RIVER.

The central issue of this appeal involves location of the ordinary high water mark. Justice Struckmeyer, in the Arizona Supreme Court decision stated:

> "Beyond argument, title to and ownership of the lands beneath the Colorado River is in the State of Arizona from the Nevada boundary up to the ordinary high water mark in the natural channel as it existed prior to the taming of the river in 1938 (sic) by the completion of the Hoover Dam and the subsequent lowering of the channel by dredging." (State v. Bonelli Cattle Company, 495 P2d 1312, 1313.)

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Establishment of the location of the ordinary high water mark of a navigable river and the area encompassed by the bed of that river, has been the subject of numerous cases including several cases decided by the United States Supreme Court. Howard v. Ingersol, 54 U.S. (13 How) 380; Alabama v. Georgia, 64 U.S. (23 How) 505; Oklahoma v. Texas, 260 U.S. 606. Although the language of these cases does not establish an exact rule for every fact situation, these cases

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generally hold that the ordinary high water mark of a navigable river is established at the line created by the water during the normal annual high flow stage of the river's annual cycle.

At first glance, it might appear that the location of the ordinary high water mark could best be determined by observing the facts of where the river now flows. In a normal situation, this might be so; however, in this case, we are dealing with a river which has been completely controlled since 1935 and the natural flow and marks created by the natural flow, are not today as readily observable as would be desired. However, Exhibits "H" and "I" attached to the Agreed Statement of Facts and Issues, being 1939 and 1942 aerial photographs of the subject property, give the Court an actual view of the conditions of the subject lands just a

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few years after complete control of the river. We submit that the natural flow of the river established the ordinary high water mark and subsequent man-made changes in the flow of the river brought about by Hoover Dam and the rechannelization had no effect upon that ordinary high water mark.

In Howard v. Ingersol, supra, the United States Supreme Court faced with a problem of defining the bed of the Chattahoochee River for purposes of establishing the boundary line between the State of Georgia and Federal Territory, established a definition of the bed of the river. This definition has since been followed in substantially all cases which have attempted to define the ordinary high water mark and the bed of a navigable river. The Court stated:

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> "condition they make what is called 'the bed of the river' . . ."(54 U.S. (13 How.) 380, 415)

And,

> ". . . the call is for the banks, the fast land which confines the water of the river in its channel or bed in its whole width . . . the bank or slope from the bluff or perpendicular of the bank may not be reached by the water for 2/3 of the year, still the water line impressed on the slope is the line required by the Commissioner, and the shore of the river though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line . . . both bank and bed to be ascertained by inspection and the line is where the action of the water has permanently marked itself upon the soil. (54 U.S. (13 How.) 380, 417)

A few years after the decision in Howard, a similar question came before the Supreme Court. In Alabama v. Georgia, supra, the Court reiterated the basic concept as to the location of the bed of a river and stated:

> ". . .(T)he bed of the river is that portion of soil which is alternately covered and left bare, as there may be an increase or diminution in the supply

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The difficulty in determining the exact location of the ordinary high water mark where substantial changes have been made which have controlled the flows of the river was recognized by the Arizona Supreme Court. In its supplemental decision, in State v. Bonelli Cattle Company, 495 P2d 1312, the Court stated:

> "Congress, of course, could not constitutionally diminish the property rights of the states to the beds of navigable rivers as settled by over 100 years of decisions of the Supreme Court of the United States commencing with Pollard v. Hagan, 44 U.S. (3 How) 212, 11 L.ed 565, in 1845. Most certainly, the United States government could not claim additional rights in the bed of a navigable river by the construction of dams and artificial channels. Nor do we find such an intent." (p. 1313)

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> ". . . The subsequent artificial control of the river could not deprive Arizona of

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The Arizona Supreme Court then cited the rule laid down in Howard v. Ingersoll, supra, and the rule of the Supreme Court of Iowa in State v. Sorenson, 222 Iowa 1248, 271 N.W. 234, which stated:

> "An accepted definition of 'high-water mark' is set out in the case of City of Cedar Rapids v. Marshall, 199 Iowa 1262, loc. cit. 1264, 203 N.W. 932, 933, where this court said: 'The term 'ordinary high-water mark' has been frequently defined by this and many other courts. It is not the line reached by unusual floods, but it is the line to which high water ordinarily reaches. [Citing case]' 'High water mark' means what its language imports -- a water mark. It is coordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. [Citing cases]'
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> "defined as to the line to which high water ordinarily reaches, and is not the line reached by the water in unusual floods. It is that line below which the soil is unfit for vegetation or agricultural purposes." (495 P2d 1312, 1314)

The bed of the Colorado River to which the State of Arizona took title, was established by the ordinary high water mark as it existed in its natural state prior to closing of the gates of Hoover Dam in 1935. That ordinary high water mark is the eastern most line shown on the composite map at page 54 of Petitioner's Brief. In the alternateive, if the Court agrees with the 9th Circuit decision in U.S. v. Claridage, supra, the ordinary high water mark must be established as the mark shown on Figure 3 at page 9 and the center line shown on the composite map at page 54 of Petitioner's Brief.

We find no cases which hold that rechannelization alters the ordinary high water mark and is sufficient to deprive a State of its title to the natural bed

of a river as it existed prior to that rechannelization.

III. THE STATE OF ARIZONA CONTINUES TO OWN THE NEW BED OF THE COLORADO RIVER WHERE IT IS ALTERED BY NATURAL ACCRETIVE MOVEMENTS OF THE RIVER.

Figures 1 through 4 included in this brief, clearly illustrate that the active flow channel of the Colorado River in the area of the subject land moved eastward a considerable distance between statehood and the date of rechannelization by the United States. The Petitioner suggests that Federal law controls the ownership of land gained or lost by accretion. Whether Federal or State law controls the present case is immaterial because State and Federal law are the same.

A. WHERE MOVEMENTS OF A NAVIGABLE STREAM ARE FOUND TO BE ACCRETIVE, OR RELICTIVE AS DIFFERENTIATED FROM AVULSIVE, THE STATE CONTINUES TO OWN THE NEW BED OF THE RIVER ESTABLISHED BY ACCRETION OR RELICTION.

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A great body of law has been established involving movements of navigable rivers and

the resulting effect on title to land within the bed of the stream and abutting the banks of the stream. Movements occur through three basic methods -- avulsion, accretion and reliction. These terms are defined as follows:

> "Accretion is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water. The term 'alluvion' is applied to the deposit itself, while accretion denotes the act. However, the terms are frequently used synonymously.
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> 'Reliction' or 'dereliction' differs from 'alluvion' in this, that the term is applied to land made by the withdrawal of the waters by which it was previously covered instead of the building up of the bottom by deposits displacing the waters. It is to be noted, however, that the temporary subsidence of waters occasioned by the seasons, coming in winter, staying through spring, going in summer, and gone through the autumn does not constitute dereliction in the sense of an addition to the contiguous lands, susceptible of private ownership as riparian rights. Where water periodically rises over land and then recedes, there is no relicion.

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> 'Avulsion' is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream . . . "
> 56 Am. Jur. Waters, 476, p. 891.

These doctrines are a part of the doctrine of riprarian rights existing in connection with title to land abutting a navigable stream. They are based upon the principle that an owner of land abutting a stream risks losing his land by erosive action of the water and should therefore benefit in cases where lands are created abutting his property. County of St. Clair v. Lovingston, 90 U.S. 46. English law established the rule that if a change occurred in the lands abutting the navigable river, resulting in the uncovering of land, this should not belong to the abutting owner, but rather to the King. Blackstone, 2 Commentaries, 262. The English rule, giving title to accretion to the sovereign, however, has not prevailed in the United States.

Until the instant case, the Arizona Supreme Court had never considered directly the effect of accretion on the boundary between the river bed and the upland. The Arizona Court had, however, considered the rights to accretion land and adopted the doctrine of accretion, including its effect on the bed of the river. State v. Jacobs, 93 Ariz. 336, 380 P2d 98 and State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P2d 352. The Arizona Court followed the Federal law regarding this subject. Arkansas v. Tennessee, 246 U.S. 158, 173.

B. WHERE FACTS ARE INSUFFICIENT TO ESTABLISH THE MANNER OF MOVEMENT OF A NAVIGABLE STREAM, THERE IS A PRESUMPTION THAT MOVEMENTS WERE ACCRETIVE AND NOT AVULSIVE.

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3. WHERE FACTS ARE INSUFFICIENT TO ESTABLISH THE MANNER OF MOVEMENT OF A NAVIGABLE STREAM, THERE IS A PRESENTATION THAT MOVEMENTS WERE ACCRETIVE AND NOT AVULSIVE.

We have heretofore indicated that no facts were produced in the Court below to establish that disputed movements of the Colorado River between 1935 and 1955 were by avulsion or

accretion. The Arizona Supreme Court in the first Bonelli decision (489 P2d 699, 702), recognized the rule of law that in the absence of clear evidence to the contrary, the movement of a river will be presumed to be by erosion and accretion. See also, Nebraska v. Iowa, 143 U.S. 359, 369-370 (1892), County of St. Clair v. Lovingston, 90 U. S. 46, 68-69 (1874).

C. WHERE THE BED OF A NAVIGABLE RIVER IS ALTERED BY ARTIFICIAL CHANGES, THE STATE CONTINUES TO OWN THAT PORTION OF THE BED WHICH IT OWNED PRIOR TO THE ALTERATION.

The facts establish that subsequent to 1935, when the gates of Hoover Dam were closed, and again subsequent to 1959, the bed of the Colorado River in the area of the subject land was altered by man-made action. The first alteration, at the time the gates of Hoover Dam were closed, resulted in controlled flows of the Colorado River, thus reducing the high flows and preventing inundation of part of the

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bed of the river to the east of the center line of the Colorado River. The second alteration in 1959 resulted in a part of the river bed being removed from the active channel of the river.

We submit that the man-made changes had no effect upon the location or extent of the bed of the river, and the land shown on Figure 1 lying between the 500 foot contour and the 1959 center line, shown on Figure 3, remains a part of the river bed and is owned by the State of Arizona. In the alternative, if the Court rejects Respondents' theory of the pre-Hoover Dam ordinary high water mark, then, we submit, that the second alteration, being the rechannelization, had no effect upon the location or extent of the river bed and that the land shown on Figures 3 and 4 lying between the "old left bank" to the east and the centerline of the artificial channel

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to the west remains a part of the river bed and is owned by the State of Arizona.

The law is clear that a sudden and perceptible change in the bed of a river works no change upon title to the lands underlying that river. Arkansas v. Tennessee, 246 U.S. 158, 173; People v. Shasta Pipe and Supply Co., 70 Cal. Rptr. 618; Padgett v. Central and Southern Florida Flood Control District (Fla.), 178 So.2d 900; State v. Aucoin, 206 La. 786, 20 So.2d 136; Ray v. State (Tex), 153 S.W.2d 660; Wilemon v. City and County of Dallas Levee Imp. Dist., (Tex), 264 S.W.2d 543 (cert. den. 348 U.S. 829.

The Petitioner recognizes the suddeness of change in the bed of the river brought about by the rechannelization (Pet. B. 28) and argues that the rechannelization brought about a re-emergence of previously submerged land. The "submergence and reappearance" argument was made to the Arizona Supreme Court.

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Simply stated, this doctrine means this: When a river moves across land by accretion, completely eroding away the intervening land but by subsequent action of the river the land previously eroded away is restored or reappears by accretion or reliction, title to the former owner reattaches to the land thus reappearing. Towl, et al, v. Kelly and Blankenship, 54 I.D. 455 (1934); Herron v. Choctaw and Chickasaw Nations, (10th Cir 1956) 228 F2d 830; Elliot v. Atlantic City, (CC, D.N.J., 1907), 149 F. 849, 853; Stockley v. Cissna, (6th Cir. 1902), 119 F. 812, 831; and Widdecombe v. Rosemiller, 118 F. 295, 299-300). The facts presented in this case simply do not indicate that this doctrine is applicable. The Arizona Supreme Court

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Yuma, et al. v. Kelly and Blackenship, 54 S.D. 465 (1934); Nelson v. Chocteau and Delorme Ranches, (10th Cir. 1955) 229 Fed 810; Elliot v. Atlantic City, (DC, D.N.J., 1901), 109 F. 849, 853; Rockaway v. Cleaves, (6th Cir. 1902), 119 F. 812, 811; and Waddecombe v. Rockefeller, 119 F. 293, 309-310).

The cases presented in this case simply do not indicate that this doctrine is applicable. The Arizona Supreme Court

recognizing the lack of the necessary facts to justify application of this doctrine, stated:

> "We believe, however, that the dredging of the river is an engineering relocation of the waters of the river by artificial means and is not a true case of withdrawal or retrogression." (489 P2d 702)

IV. PETITIONER'S OTHER CONTENTIONS ARE WITHOUT MERIT.

A. WHETHER A DECISION OF THE ARIZONA SUPREME COURT AFFECTS TITLE TO FEDERAL LAND AND INDIAN LAND AS WELL AS PRIVATE LAND BORDERING THE COLORADO RIVER.

Petitioner and amicus curiae before the Arizona Supreme Court, sought to broaden the issues to include questions regarding title to Federal and Indian lands and title to vast acreage of private lands in other areas along the Colorado River. These title questions are outside the scope of this appeal and even if the other parties were properly before this Court, the law controlling accretion and

the bed of the river as heretofore discussed, would remain the same.

B. THE EFFECT OF THE SUBMERGED LANDS ACT.

As heretofore discussed, Congress by the Submerged Lands Act of 1953, 67 U.S. Stat. 29, 43 U.S.C. Sec. 1301, et seq., confirmed and recognized the respective states title to land beneath navigable waters lying within a state. As stated in People v. Hecker, supra, the Submerged Lands Act was merely a declaration that title to the navigable waters had already vested in the respective states and by the Act such title was recognized and confirmed.

C. THE DECISIONS OF THE ARIZONA SUPREME COURT DO NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT COMPENSATION.

The Petitioner argues that the State of Arizona has, by decision of the Arizona Supreme Court, taken property without compensation. This argument seems to be economic rather than

legal and, therefore, not controlling. In any event, if a taking of property occurred, it was a taking resulting from the legal doctrine of accretion and occurred slowly and imperceptibly as the Colorado River moved eastward across land which had been patented to Petitioner's predecessor in interest by the United States.

The Petitioner argues that the doctrine of equitable estoppel should be applied to prohibit the State of Arizona from asserting its title to the bed of the Colorado River. The elements of equitable estoppel are set forth at 3 Pomeroy's Equity Jurisprudence, Sec. 805 at p.191. These elements include, (1) conduct or silence amounting to a representation or a concealment of material facts, (2) the facts must be known to the party estopped, (3) the truth concerning the facts must be unknown to the party claiming the

benefit of the estoppel, (4) the conduct must be done with the intention or at least with the expectation that it will be enacted upon by the party, (5) the conduct must be relied upon by the other party, and (6) the party claiming the estoppel must in fact act in such a manner as to change his position for the worse.

When the facts of the instant case are applied to these elements, it is clear that equitable estoppel does not lie. Because of the meanderings of the Colorado River, it has always been difficult for Arizona to assert ownership to any particular lands because the State's ownership is "at the mercy of the river". In no way has there been any false representation or concealment of any material facts by the State of Arizona.

No authority exists that says the State must legislate or make an executive decree concerning land title, as is suggested in Petitioner's

Brief. The State has no legal duty to speak, therefore, Bonelli has no right to rely on the State's executive and legislative silence. The Petitioner took title to the land in question by Warranty Deed, dated the 12th of August, 1955 (App. 14). On that date, as is shown on Exhibit E-1, a copy of which is attached to the Agreed Statement of Facts and Issues and is included herein as Figure 3, the bed of the Colorado River occupied substantially all of the land described in the Warranty Deed. Therefore, it seems impossible that the Petitioner can now claim he acted in reliance on the action or inaction of the State of Arizona. Whether Petitioner was ignorant of the facts is of no moment since he had the opportunity to inspect the property and to determine if it was within the bed of the Colorado River.

Any taking of Petitioner's land which

has occurred is a taking resulting from the movement of the Colorado River.

CONCLUSION

In 1955, the Petitioner received a Warranty Deed to the subject land. This land was originally patented to Petitioner's predecessors in interest shortly after Arizona statehood. The land was a considerable distance from the surveyed bed of the Colorado River but within an area which had been inundated by the river's high flows in previous years. Construction of Hoover Dam reduced the flow of the Colorado River in 1935 and the usual high flows no longer inundated the subject lands. The active channel of the river moved eastward until in 1955 the majority of the subject land was covered by the flow of the river. In 1959, the river was rechannelized by the United States through the subject land, constricting the

river to a small area and leaving exposed from the prior flow of the Colorado River, a large portion of the subject land.

The State of Arizona is the owner of the bed of the navigable Colorado River. That bed changed slowly and imperceptibly as the river moved eastward and Arizona retained title to the bed when it was abandoned by reduction of water when the gates of Hoover Dam were closed in 1935 and when the rechannelization occurred in 1959.

The decision of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

GARY K. NELSON
THE ATTORNEY GENERAL
OF ARIZONA

By: Dale R. Shumway
Special Assistant
64 E. Broadway
Tempe, Arizona 85282

PROOF OF SERVICE

I, JOHN M. McGOWAN, Special Assistant Attorney General, one of the attorneys for the above-named respondents herein, and a member of the Bar of the Supreme Court of the United States, certify that on the 15 day of June, 1973, I served copies of the foregoing Brief of Respondents on the Petitioners by mailing copies in duly addressed envelopes with first class postage prepaid to their attorneys of record as follows:

ELMER C. COKER
132 South Central Avenue
Phoenix, Arizona 85004

THE HONORABLE LEONARD C. LANGFORD
Mohave County Attorney
Courthouse
Kingman, Arizona 86401

Attorneys for Petitioners

GARY K. NELSON
The Attorney General

By John M. McGowan
JOHN M. McGOWAN

SUBSCRIBED AND SWORN to before me this 15 day of June, 1973.

E. Louise Lang
Notary Public

My commission expires: 10-24-73

SUPREME COURT, U. S.
FILED
SEP 20 1973
MICHAEL RODAK, JR., CLERK

No. 72-397

In the Supreme Court of the United States

OCTOBER TERM, 1973

BONELLI CATTLE CO., ET AL., PETITIONERS

v.

THE STATE OF ARIZONA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in continuing response to the invitation of this Court on November 20, 1972, requesting the Solicitor General to express the views of the United States in this case. In January 1973 we submitted a memorandum urging that certiorari be denied because the Arizona Supreme Court's decision reached the right result, though it erred in several respects in the process of reaching its decision. This Court having granted certiorari, this memorandum is submitted supporting affirmance of the Arizona decision, on the assumption that we construe it correctly.

INTEREST OF THE UNITED STATES

The United States, through the Bureau of Land Management, the Bureau of Sport Fisheries and Wildlife, and the Bureau of Indian Affairs, is the owner

of more than 200 miles of Colorado River shoreline in the State of Arizona, much of which is directly affected by the rule of law laid down in this case. The quiet enjoyment of some of this land has been threatened by some interpretations of this decision.[1] In addition, the United States has an interest in the maintenance of the principle of the supremacy of federal law in the resolution of disputes concerning the boundaries of lands deriving from federal patents.

DISCUSSION

1. The opinion of the Arizona Supreme Court can be read as quieting the state's title to any portion of the former riverbed which was below the high water mark at any time between the admission of Arizona to the Union and the channelization of the Colorado River in 1959. Such a holding may be implied by the court's statement that "Arizona's title as against private persons is in no way controlled by the opinion in *United States* v. *Claridge*, 279 F. Supp. 87, aff'd 416 F. 2d 933" (Pet. App. 6b). We submit such a ruling would be wholly erroneous, as applied to any owner—like the Bonellis—whose title derived from a federal patent issued before statehood.

The true rule is that the extent of the estate of a patentee from the United States is governed by federal law, and that, as a matter of federal law, any lands exposed by reliction accrue to the riparian patentee on

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[1] We are informed by the Interior Department that Arizona agencies have attempted to grant leases to federal land which would belong to the state under an expansive interpretation of this decision. A proper interpretation of the decision would avoid possible State-Federal conflict over extensive federal riparian land holdings.

a navigable body of water. *Hughes* v. *Washington*, 389 U.S. 290. The decision in *Claridge* is an application of that principle and would be controlling here if any reliction had occurred adjacent to the Bonelli tract. As we understand the Arizona Court's opinion, however, it assumes no such occurrence (see Pet. App. 4a), and there may be, accordingly, no occasion to apply the federal rule.

2. Our conclusion depends on construing the Arizona court's opinion as applying the correct federal standards in locating the high water mark in the river. The federal rule, as expressed in *Alabama* v. *Georgia*, 23 How. 505, 515, is that the bed, which is owned by the State, is that area which "is adequate to contain [the supply of water] at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring * * *." See also *Oklahoma* v. *Texas*, 260 U.S. 606, 631-632. This comports with the definition in *Howard* v. *Ingersoll*, 13 How. 381, 427, cited by the Arizona court (Pet. App. 7b) in that the banks, which are held not to be state property, are those elevations which contain the water when it rises out of the bed during the "extraordinary freshets." Thus, the rule laid down in the Arizona court's supplemental opinion seems to be consonant with existing federal law.[2]

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[2] We note that the court's supplemental opinion states that the boundary is "the ordinary high water mark *in* the natural channel" (Pet. App. 4b) (emphasis added), and that "[i]t is in the sense of the usual and ordinary that the words * * * 'high water mark' were used in our decision * * *" (Pet. App. 6b). These indications would seem to exclude the areas covered only by brief and unusual annual floods from the area within the high water mark. *State* v. *Sorenson*, 222 Iowa 1248, 271 N.W. 234, specifically approved by the Arizona court, states that the high water mark "is not the line reached by unusual floods, but the line to which high water ordinarily reaches" (Pet. App. 8b).

If, as the Arizona court leads us to believe, no part of the Bonelli tract which was once below the high water mark ever emerged until channelization in 1959, and that the only change effected by the erection of Hoover Dam was the elimination of the spring floods—which must be ignored in fixing the riparian boundary[3]—it follows that the *Claridge* rule of reliction does not apply and the result reached is correct.

3. We recognize, of course, that a substantial change occurred when the Colorado River was channelized in 1959. This action, however, cannot be characterized as reliction. The river receded suddenly and dramatically, as a consequence of work undertaken for the very purpose of narrowing and deepening the channel. Such an avulsion in a navigable river does not affect the title to adjacent

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[3] The composite map which appears at Petition, page 33, Petitioner's Appendix, page 2d, and Petitioner's Brief, page 54, accurately reflects the boundary that would be established in this case under federal law. That boundary is the ordinary high water mark of the Colorado River, exclusive of the annual floods which occurred prior to the closing of Hoover Dam, which leaves the Bonellis as owners of some 60 acres in the southeast corner of Section 3, lying to the east of the line marked as the "*Claridge* line" on the composite map. We note, however, that both the Bonellis (Br. 10-11) and the State of Arizona (Br. 28-30) apparently contend that the Arizona Supreme Court's decision fixed the pre-1959 ordinary high water mark at the level reached by the spring floods before the erection of Hoover Dam. This is the line marked as the "*Bonelli*" high water mark on the composite map. We emphasize that this line is not a judicially determined line. It is a construction made by the parties in this case: by Arizona because they hope it is the correct line and by the Bonellis because they fear it is. We disagree. We believe that the Arizona decision correctly places the pre-1959 ordinary high water mark (and thus the boundary between Bonelli and State property) at the boundary of the actual active channel of the River before the channelization.

lands, and the exposed riverbed remains state property, up to the riparian boundary prior to the avulsion. *Oklahoma* v. *Texas*, 258 U.S. 574, 583; *Philadelphia Company* v. *Stimson*, 223 U.S. 605, 631-632; *Nebraska* v. *Iowa*, 143 U.S. 359, 361. Longstanding federal administrative practice has also recognized that the changes caused by channelization are avulsive changes. The *Claridge* case did not involve a channelization, and thus in no way conflicts with the Arizona decision, which was correct as a matter of federal law on this point.[4]

CONCLUSION

On the assumption that we properly construe the opinion of the Arizona Supreme Court, we believe the judgment is correct and accordingly, urge affirmance. Nevertheless, in order to avoid a precedent adverse to the interest of federal patentees, we submit this Court should expressly announce the controlling federal law applicable in the circumstances.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[4] This case does not raise any issue of access to the water. If the state were to deny any of the former riparian owners reasonable access to the river to exercise any water or riparian rights owned before the rechannelization, such denial might very well be illegal, or amount to a taking of property. This is particularly true with respect to riparian Indian lands granted for the purpose of allowing the Indians to fish or otherwise use the water. But that issue is not raised by the Bonelli Cattle Company's complaint. Neither does the issue appear to have been considered or discussed by the Arizona courts.

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Petitioners,

v.

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Arizona

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REPLY BRIEF FOR THE PETITIONERS

ELMER C. COKER
Luhrs-Central Building
Phoenix, Arizona 85004

LEONARD C. LANGFORD
Mohave County Attorney
Kingman, Arizona 86401

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ELMER C. COKER
Luhrs-Central Building
Phoenix, Arizona 85004

LEONARD C. LANGFORD
Mohave County Attorney
Kingman, Arizona 86401

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75 Stat. 93, Public Law 87-50, June 16, 1961 ---------- 17

80 Stat. 340, Public Law 89-531, August 11, 1966 ---------- 18

Arizona, Laws of 1960, C. 69 ---------- 17

Arizona, Laws of 1963, C. 77 ---------- 18

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Nevada, Laws of 1960, C. 119 ---------- 17

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

v.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Arizona

---

REPLY BRIEF FOR THE PETITIONERS

ERRATA

Two errors appear in petitioners' opening brief and one error appears in respondents' brief.

In the citations of petitioners' brief the index under Miscellaneous recites the Executive Order of May 15, 1976, the correct date being May 15, 1876. Also on page 11 of petitioners' brief under History of the Colorado River the figure "500 miles" appears in the fourth line from the bottom of the page which correctly should read "200 miles".

Appearing on page 44 of respondents' brief the word "after" appears in the fourth line under the conclusion which should read "before".

REPLY

We feel that all parties filing briefs herein have exhaustively stated, with authorities, their respective positions on the complex questions facing this Court. It is conceded by all that each state is free to adopt or make

changes:

> "either legislative or judicial, in its general rules of real property, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general rules."

provided that such changes do not constitute a taking from the riparian owner of his land and improvements without paying for the privilege of doing so. *Hughes v. Washington*, 389 U. S. 290, 19 L. Ed. 2d 530, 88 S. Ct. 438 (1967) at 535 and 536.

We presume this Court intended to limit the exercise of this right to the grant made by *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565 (1845) and later confirmed by the Submerged Lands Act, 43 U. S. C. §1301 et seq., to those submerged lands beneath the navigable stream up to the ordinary high water mark in the existing navigable channel and did not intend

changes:

"Neither legislative or judicial, in its general rules of real property, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general rules."

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that these rights would extend beyond that point to cover large areas of exposed land whether the exposure resulted from natural causes or were man-made for the purpose of improving or controlling the navigable stream in aid of navigation purposes.

While it is recognized that Arizona became admitted into the union on an equal footing with the other forty-eight states, the history of Arizona's long fight for statehood discloses that over a long period of time the Congress of the United States for political reasons attempted to force its admission as a joint state with the Territory of New Mexico (or in other words, joint statehood). This proposition was resoundly defeated by the people of the Territory of Arizona and as a result of this refusal Congress apparently wrought its vengeance on the people of

the Territory of Arizona by enacting a very restrictive Enabling Act relating to federal land grants for both Arizona and New Mexico as a condition precedent to their admission into the union, which conditions were finally accepted by the people of Arizona by the adoption of Article X of their Constitution in 1910.

Whereas the Joint Resolution No. 8 of Congress, August 21, 1911, 37 U. S. Stat. 39, did on its face admit the Territories of New Mexico and Arizona into the union on an equal footing with the other forty-eight states, it restricted the equal footing status (see footnote 7, *Texas v. Louisiana, infra*) by the restrictive covenants of the Enabling Act relating to federal land grants. The people of Arizona in adopting their Constitution in conformity with the Enabling Act, particularly Article X thereof, in two

different sections stated in effect that all land transferred and confirmed to the State by the provisions of the Enabling Act including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, *and all lands otherwise acquired by the State*, shall be held by the State in trust and disposed of in whole or in part only in the manner prescribed by the Enabling Act of the Constitution (Article X, ¶1, Arizona Constitution). To the same effect is section 9 of Article X of the Arizona Constitution relating to the sale or lease of such lands. Under these provisions it is clear that the legislature of Arizona is powerless to overrule the decisions of the Arizona Supreme Court and recognize the property rights of the owners of riparian lands along the Colorado River

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unless this Court holds otherwise.

Generally speaking, petitioners have no quarrel with the general principles of law stated by respondents in support of the two questions presented on page 16 of their brief. But the question is, do these general principles apply to Arizona because of the peculiar nature of the conditions under which Arizona was admitted to the union and the fact that every foot of land along the Colorado River at the time of statehood was owned by the United States except land that had been previously conveyed by the United States to private parties such as the Santa Fe grant in Arizona, which consisted of almost 42,000 acres bordering the Colorado River (see brief of Santa Fe Railroad, p. 1)? To apply the theory of respondents, if the federal government in rechannelling the

Colorado River had constructed the channelization works miles away from the river, Arizona could (and undoubtedly would) still claim title to the Bonelli and other shoreline lands under the doctrine of accretion as adopted and defined by the Arizona Supreme Court in addition to retaining ownership of the submerged lands under the new stream bed.

The State of California through its Attorney General has filed an excellent amicus curiae brief in support of the position of Arizona. However petitioners desire to point out there is a major difference between the law applicable to the State of California and the law applicable to the State of Arizona. In the first place California has the benefit of the Swamp Act, 43 U. S. C. 981 et seq. (particularly with reference to section 987).

Secondly, California by statute originating in 1872 has through its legislature acted on the subject matter:

> "The state is the owner of all land below the tide water, and below ordinary high water mark, bordering upon tide water within the state; of all land below the water of a navigable lake or stream; * * * ". Section 670, West's Annotated California Civil Code, Volume 7.

On the other hand Congress by the enactment of the Enabling Act specifically denied Arizona the benefits of the Swamp Act and Arizona was given other grants in lieu thereof (Section 25, Enabling Act). For over 60 years the legislature and the people of the State of Arizona through constitutional declaration have either deliberately or intentionally failed through its legislative processes to claim any portion of the Colorado River or its shorelands as it flows through Arizona.

It was not until almost 60 years after statehood and 40 years after the Colorado River was declared to be a navigable stream by this Court in *Arizona v. California*, 283 U. S. 423, 75 L. Ed. 1154, 51 S. Ct. 522 (1930) that Arizona through ex post facto judicial legislation as evidenced by the two *Bonelli* decisions laid any claim whatsoever to the riparian lands along the Colorado River, although its neighboring state of Nevada as early as 1921 (some 9 years before *Arizona v. California, supra*) did so by enacting Section 537.010, Nevada Revised Statutes, which provide:

> "All of the Colorado River within the state of Nevada, from the Arizona line on the North to the California line on the South, is hereby declared to be a navigable stream for purposes of fixing ownership of the banks and bed thereof, and title to the lands below the high water mark thereof is held by the state of Nevada, insofar as they lie within the state." (1:971, 1921; NCL, Section 1425).

California does make an error of fact in its brief at the bottom of page 2, viz., "at the time of the grant to Santa Fe, the property in question *was not riparian land along the Colorado River.*" While this statement might perhaps be technically correct at the present time, the undisputed fact is that all of section 3 east of the Colorado River at the time it was conveyed by the United States to the Santa Fe by patent dated November 5, 1910, was riparian (see Agreed Statement, Exhibit C, App. 16-17; Township Plat, Exhibit B, App.15).

The Solicitor General of the United States in his amicus curiae brief admits that the rule in *Hughes v. Washington, supra*, should apply and that federal law should govern; he believes that under the Arizona decisions they could be interpreted as affecting federal lands as well

as Indian lands, but he disagrees with the Arizona Supreme Court's statement that Arizona's title as against private persons is in no way controlled by the opinions in *United States* v. *Claridge*, 279 F. Supp. 87 (1967), 416 F. 2d 933 (1969) (page 2 of brief). However the Solicitor appears to reverse himself in that while admitting that the language in the Arizona decisions is not clear but on the other hand as he interprets them he concludes that there is no conflict between the federal rule and the Arizona rule. Apparently he does not concur with petitioners' and respondents' interpretation of the difference in conflict of the boundary lines established by *Claridge* and *Bonelli* and concludes that the boundary line established by both cases is the same (page 4, footnote 3 of brief). However this conclu-

sion we submit is not based upon the facts of record before this Court. The interpretation of the respective boundary lines by petitioners and respondents as established by *Claridge* and *Bonelli* are clearly supported by the following documentary evidence of record attached to the agreed statement of facts (App. 6), namely: 1950 Davis Dam Quadrangle, Exhibit J; Bureau of Reclamation Topographic Map, Exhibit E-1; USGS Topographic Map, 1902-1903, Exhibit K; 1960 Mosaic Aerial Survey Photo, Exhibit D; Aerial Photo of April 24, 1938, Exhibit H; Aerial Photo 1942, Exhibit I; Plat of Limited Dependent Resurvey of Sections 2 and 10, Exhibit G (p. 55 petitioners' opening brief).

The Solicitor further attempts to distinguish *Claridge* and *Bonelli* by stating that *Claridge* did not involve channelization, but he fails to point out that

Claridge involved the change of the main channel of the Colorado River as the result of the construction of Hoover Dam and other dams and levees and dykes designed to confine and improve the channel and control the flow of the river (279 F. Supp. 87 at 90,91). It is clear therefore that there is no realistic or legal distinction between the works done in *Claridge* by the federal government through its Bureau of Reclamation and the channelization work done by the Bureau of Reclamation in *Bonelli*.

In conclusion, the Solicitor incorrectly concludes that in Bonelli's complaint to quiet title it failed to raise any issue of the denial of riparian access to waters of the Colorado River and assert any claim of damages therefor. Under statutes of Arizona relating to quiet title actions such an issue is neither necessary nor germane to a quiet title action or com-

plaint because under the Arizona rule the context of plaintiff's complaint is limited to:

> "The complaint shall:
>
> "1. Be under oath.
>
> "2. Set forth generally the nature and extent of plaintiff's estate.
>
> "3. Describe the premises.
>
> "4. State that plaintiff is credibly informed and believes defendant makes some claim adverse to plaintiff.
>
> "5. Pray for establishment of plaintiff's estate and that defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to plaintiff." (Section 12-1102, Arizona Revised Statutes.)

From a review of all the authorities cited by counsel in their respective briefs before this Court and the factual situation which is admitted to exist herein it would appear that a paraphrase of a law review article entitled Extending the Application of the Law of Accretions, Vol. 23, Ohio State Law Journal 771, 773, in reviewing

Michaelson v. Silver Beach Imp. Ass'n., 342 Mass. 251, 173 N. E. 2d 273 (1961), is most apropos:

> "If the Superior Court's (Arizona Supreme Court's) theory in the principal case were followed, the government (Bureau of Reclamation) could create accretion by dredging alone Lake Erie (Colorado River) and (Arizona) could claim title to the entire shoreline. Then all riparian owners would be deprived of access to navigable waters and thereby lose the greatest attraction possessed by riparian property. The theory of riparian property is to encourage, not frustrate, the development of private access to the sea (river). The instant case adheres to this doctrine and reaches a fair and just result."

The doctrine of gain and loss of title as a result of accretion is based upon the equitable doctrine that the riparian owner who suffers the loss of his land by accretive movements of a navigable stream should likewise gain his land back together with accretive additions when the movement is reversed. Here it is apparent that Arizona has never suffered loss by the move-

ment of the Colorado River but to the contrary now claims a gain of thousands of feet in some areas along the river as a result of such movement.

While Arizona through its legislative processes has never legislated on the subject matter by claiming ownership of the beds and banks and accretion rights of the Colorado River it has however by entering into Compacts with the States of Nevada and California establishing boundaries between the respective states impliedly recognized private titles to fee lands along the shoreline of the river and prescribed that they should not be disturbed as a result of the new boundaries established by the Compacts and ratified by Congress (see Section 5 of both Compacts). Laws of Arizona 1960, Chapter 69, Laws of Nevada 1960, Chapter 119, ratified by Congress June 16, 1961, Public Law 87-50, 75 Stat. 93; Laws

of Arizona 1963, Chapter 77, West's Cal. Ann. Gov. Code, Sections 175, 176, ratified by Congress August 11, 1966, Public Law 89-531, 80 Stat. 340. In the Bonelli land location the Arizona-Nevada boundary is from the center of the Colorado River as rechannelled by the Bureau of Reclamation.

Respondents in answer to petitioners' charge that the decisions of the Arizona Supreme Court constitute a taking of Bonelli's property without compensation and that the doctrine of sovereign estoppel should apply and bar the State at this late date from asserting title to riparian or shoreline lands along the Colorado River after so long a period of silence and inaction in asserting claim of ownership very briefly on pages 40 and 41 of their brief completely ignore

this Court's decision in *Hughes v. Washington, supra,* and restate the position of the Arizona Supreme Court in *Bonelli* on rehearing at page 1313, 495 P. 2d (Pet. App. B, pps. 2b-3b) "this argument seems to be economic rather than legal and therefore not controlling". Petitioners submit that the economic problems created by the decisions of the Arizona Supreme Court constitute a confiscatory ex post facto taking by the State of previously recognized property rights which have existed over the years thereby establishing a constitutional problem and, as above stated, leaving the legislature powerless to act by relief measures for the benefit of the owners of these lands as a result of the taking.

Respondents attack petitioners' position on the doctrine of equitable

estoppel on the limited grounds that in this particular case Bonelli apparently took title to the parcel of land in question with notice on August 12, 1955 (the date of the warranty deed to Bonelli, App. 14) that at some time in the future the State of Arizona might claim ownership of the land and lists the prescribed necessary elements of equitable estoppel.

While in the Bonelli case some of these elements possibly could be missing (although we do not so agree) nevertheless the fact is that it is admitted as a matter of fact before this Court by not only California but also Arizona, Santa Fe and even the Solicitor General that there are over 200 miles of river frontage land in Arizona alone, title to which is in jeopardy as a result of the Arizona Supreme Court decisions. Respondents state on

page 42 of their brief that because of the meanderings of the Colorado River it has always been difficult for Arizona to assert ownership to any particular lands because the State's ownership is "at the mercy of the river". Likewise the fee owners have been facing the same dilemma, particularly now that Arizona claims ownership to their lands some 60 years after statehood and 40 years after the Colorado River was declared a navigable stream by this Court in *Arizona v. California, supra.* The State could have, and it was its duty through legislative process to follow the steps of California, Nevada and other states, asserted such ownership thereby giving every person owning lands along the Colorado River as well as the federal government and Indians notice of its claim of ownership.

Since the writing of petitioners' and respondents' briefs the Ninth Circuit Court of Appeals on July 13, 1973, in the case of *United States of America v. Lazy FC Ranch et al.*, No. 71-2318, ____F. 2d____ (unreported at the date of this writing) applies the doctrine of sovereign estoppel against the United States even though it was acting in its sovereign capacity. Some of the language used by the Ninth Circuit Court is apropos to the situation which we have at hand:

> "We think the estoppel doctrine is applicable to the United States *where justice and fair play require it.* The Supreme Court applies this rationale in Moser v. United States, 341 U. S. 41 (1951). * * * The Court permitted the government to be estopped even though it was acting in its sovereign capacity because under the circumstances of the case, *to do otherwise would violate notions of 'elementary fairness'.* * * *
>
> "This court has also followed this rationale and permitted the estoppel

defense against the government in cases *where basic notions of fairness required us to do so.*

* * * *

"The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government *if the government's wrongful conduct threatens to work a serious injustice* and if the public's interest would not be unduly damaged by the imposition of estoppel. * * * This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity. * * * ". (Ephasis supplied.)

We submit that in the interest of justice and fair play that the State of Arizona now at this late date after large areas of originally bare river frontage lands have been highly developed and improved by private capital is equitably estopped and barred from asserting its ownership to these lands and improvements once covered by the waters of the meander-

ing and unpredictable Colorado River.

In conclusion it would appear from a reading of the questions presented by petitioners and respondents and all of the briefs submitted by the parties and amici curiae covering these questions that out of the questions presented and as a corollary thereto there are five very important questions this Court must resolve in order to lead us out of the thicket of confusion that now exists:

(1) What is the extent of the grant to the states upon admission to statehood to the submerged lands of a navigable stream as expressed by *Pollard v. Hagan*, *supra*, and later the Submerged Lands Act, *supra*?

(2) When the purpose of this grant no longer exists because of the movement of the river, namely, access by the public

and unpredictable Colorado River.

In conclusion it would appear from a reading of the questions presented by petitioners and respondents and all of the briefs submitted by the parties and amici curiae covering these questions that out of the questions presented and as a corollary thereto there are five very important questions this Court must resolve in order to lead us out of the thicket of confusion that now exists:

(1) What is the extent of the grant to the states upon admission to statehood to the submerged lands of a navigable stream as expressed by Pollard v. Hagan, supra, and later the Submerged Lands Act, supra?

(2) When the purpose of this grant no longer exists because of the severance of the river, namely, access by the public

to the navigable stream through state ownership of the submerged lands thereunder, does the grant cease to exist on exposed land no longer required for such purposes?

(3) If this grant is unrestricted and provides the means of additional land acquisition, can the state establish its own boundary of ownership or must it follow a boundary prescribed by the federal courts?

(4) Can Arizona assert title to these large areas of exposed land which have reemerged and become exposed as a result of confining the channel of the navigable stream after remaining silent for almost 60 years:

(a) After these lands have been extensively developed and improved by bona fide owners whose title was derived from the federal government;

(b) After the owners of these lands have

paid taxes to the state and its legal subdivisions on the lands and improvements thereon throughout this entire period relying on the silent acquiescence of the state in recognizing their ownership,

without compensating the owners for not only the loss of their land title but their improvements placed thereon?

(5) Does the doctrine of sovereign estoppel apply to the State of Arizona after such a long period of time and is it thereby equitably estopped and barred from now claiming ownership of these lands and the improvements thereon by ex post facto judicial legislation?

CONCLUSION

It must be remembered that the decisions of the Arizona Supreme Court not only involve the Bonelli lands but also

admittedly hundreds of acres of highly developed land along the shoreline of the Colorado River, the ownership and usage of which has been recognized by the State of Arizona and the Counties of Mohave and Yuma since statehood by the assessment, levy and collection of taxes thereon, which petitioners submit constitutes a usage as stated by by this Court "of so great a length of time as to have acquired the force of law", *Texas v. Louisiana*, ___ U. S. ___, 35 L. Ed. 2d 646, 93 S. Ct. ___ (1973) at 653.

For the foregoing reasons we respectfully urge that this Court reverse the two decisions of the Supreme Court of Arizona and affirm the judgment of the trial court and the decision of the Court of Appeals. Otherwise, if this Court should refuse to reverse the Arizona de-

cisions and should affirm the Arizona Supreme Court decisions on any theory, it is clear that the legislature of Arizona, in view of the restrictive covenants in the Enabling Act and Article X of the Arizona Constitution, is barred from granting any relief to the owners of lands and the improvements thereon bordering the shoreline of the Colorado River.

Respectfully submitted,

ELMER C. COKER
Luhrs-Central Building
132 South Central Avenue
Phoenix, Arizona 85004

Attorney for Petitioner
Bonelli Cattle Company

LEONARD C. LANGFORD
Mohave County Attorney
Kingman, Arizona 86401

Attorney for Petitioner
County of Mohave

By ELMER C. COKER

OCT 10 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-397

BONELLI CATTLE COMPANY, *et al.*, *Petitioners*,

v.

STATE OF ARIZONA, *et al.*, *Respondents*.

On Writ of Certiorari to the Supreme Court of the State of Arizona

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME AND BRIEF OF AMICUS CURIAE, COCOPAH TRIBE OF INDIANS

DAVID H. GETCHES
A. JOHN WABAUNSEE
CHARLES F. WILKINSON
Counsel for Amicus Curiae
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

October, 1973

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On Writ of Certiorari to the Supreme Court of the State of Arizona

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME

The Cocopah Tribe of Indians respectfully moves for leave to file out of time the attached brief amicus curiae.

Amicus is a small American Indian tribe, located along the Colorado River in the extreme southwestern corner of the State of Arizona. The Tribe had no knowledge of the pendency of this case until the middle of September, 1973. The Cocopah Tribe is without regular, retained counsel. Counsel here, who serve without fee, agreed to file a brief amicus curiae on September 24, 1973. Upon receipt of the authorization to proceed with the preparations of the brief amicus curiae, counsel then learned that oral argument had been set for October 15, 1973. Amicus realizes that the

Motion for Leave to File Brief Amicus Curiae is untimely. The consents of the petitioners and respondents to the filing of the brief have not been sought because of the late date. Nevertheless, because the question of title to accreted lands is vital to amicus, and because the delay in filing could not have reasonably been avoided, amicus urges the Court to accept out of time the very short brief amicus curiae.

The interest of the Cocopah Tribe of Indians arises from the fact that the Tribe owns accreted lands in the State of Arizona which were created as the bed of the Colorado River shifted. To the extent that this Court's decision affects title to accreted lands in Arizona, it will affect the rights of the amicus Tribe and other tribes along the Colorado River, including those residing on the Fort Mohave Reservation, the Fort Yuma Reservation, and the Colorado River Reservation. The Tribe's very survival depends on the Tribe's land base, much of which is comprised of accreted land. The Tribe believes it is essential to advise the Court that any decision relating to a dispute between non-Indian landowners and the State of Arizona over accreted lands should not affect Indian rights to accreted lands.

Respectfully submitted,

DAVID H. GETCHES
A. JOHN WABAUNSEE
CHARLES F. WILKINSON
Counsel for Amicus Curiae
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

October, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-397

BONELLI CATTLE COMPANY, *et al., Petitioners,*

v.

STATE OF ARIZONA, *et al., Respondents.*

On Writ of Certiorari to the Supreme Court of the State of Arizona

---

BRIEF OF AMICUS CURIAE. COCOPAH TRIBE OF INDIANS

INTEREST OF AMICUS CURIAE

The interest of amicus, the Cocopah Tribe of Indians, is set forth in the accompanying Motion for Leave to File Out of Time.

ARGUMENT

The Cocopah Tribe resides on the Cocopah Indian Reservation, which was created in 1917 by Executive Order of the President, No. 2711, September 27, 1917. Title to the reservation lands is held by the United

States, as trustee for the Cocopah Indians. The Cocopah Tribe's rights in tribal land are specifically protected by statute:

> Changes in the boundaries of reservations created by Executive Order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided,* That this shall not apply to temporary withdrawals by the Secretary of the Interior. (25 U.S.C. §398d, 44 Stat. 1347.)[1]

Thus, unlike petitioners here, amicus holds a federal title protected by federal statute. It is a well established rule of law that the United States cannot lose title to lands by estoppel, laches, mistakes, adverse possession or acquiescence. *See, e.g., United States* v. *Claridge,* 279 Fed. Supp. 87, 91 (D. Ariz. 1966), *aff'd,* 416 F.2d 933 (9th Cir. 1969), *cert. denied,* 397 U.S. 961 (1969), where this rule was used against a private claimant in the State of Arizona, who claimed lands which had accreted and relicted to land owned by the United States. The Court in *Claridge* held that the United States as a riparian landowner owned accreted land to the ordinary high water mark of the Colorado River within the existing banks of the River, regardless of the fact that the riverbed had been shifted by channelization.

---

[1] The same protection extended to Executive Order reservations has been extended to treaty reservations by judicial rule. This Court in *Choctaw Nation* v. *Oklahoma,* 399 U.S. 620, 631 (1970), said:

> This Court has often held that treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful expression in them should be resolved in the Indians' favor. (citations omitted.)

Amicus realizes that any case involving ownership of accretions to federally-owned land or to land where title was derived from the federal government must be determined by federal law. *Hughes* v. *Washington,* 389 U.S. 290, 291 (1967), and *United States* v. *Washington,* 294 F.2d 830, 833 (9th Cir. 1961), *cert. denied,* 369 U.S. 817 (1962). However, unless this Court's decision here is specifically limited to non-Indian lands, doubt may be cast upon the title and claims of amicus, and other tribes, to accreted and relicted lands.

If the Court holds for the State of Arizona, the State will own a strip of land along the River to the exclusion of the riparian owners, which might arguably include the Cocopah Tribe. The Cocopah Tribe urges the Court to follow the common law rule of accretion and acknowledge the State's ownership of the riverbed and the riparian owners' rights to accreted or relicted land. Should the Court hold for the State of Arizona, amicus urges that its holding be limited expressly to Arizona's claims to accretions and relictions to other than Indian lands.

Respectfully submitted,

DAVID H. GETCHES
A. JOHN WABAUNSEE
CHARLES F. WILKINSON
Counsel for Amicus Curiae
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

October, 1973

Syllabus

BONELLI CATTLE CO. ET AL. *v.* ARIZONA ET AL.

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 72–397. Argued October 15, 1973—Decided December 17, 1973

Certain land abutting the east bank of the Colorado River was conveyed in 1910 by federal patent to a railroad company. Upon admission to the Union in 1912 Arizona succeeded the Federal Government to title to the bed of the Colorado River. The river's gradual eastward movement submerged the subject land by erosion so that title was mechanically transferred to the State as part of the riverbed. In 1955 petitioner cattle company acquired title to the original railroad grant, most of which by that time was covered by water. In 1959 the subject land was abandoned by the Colorado as a result of a federal rechanneling project. Petitioner cattle company filed this action to quiet title and prevailed in the lower courts, but the Arizona Supreme Court reversed, holding that under the equal-footing doctrine and the Submerged Lands Act, Arizona held title to the beds of all navigable waters within its borders and thus to the subject land as a result of the river's gradual eastward movement. *Held:*

1. Ownership of the subject land is governed by federal law. The issue here is not what rights the State has accorded private owners in lands that the State holds as sovereign but how far the State's sovereign right extends under the equal-footing doctrine and the federal Submerged Lands Act, *i. e.*, whether the State retains title to lands formerly beneath the Colorado or whether title thereto is defeasible by withdrawal of those waters. Pp. 317–321.

2. The equal-footing doctrine does not support the State's claim, since when the water receded from the disputed land, there was no longer a public purpose to be served by the State, as sovereign, holding title thereto. Pp. 321–324.

3. Nor does the Submerged Lands Act, which did not abrogate the federal law of accretion, support the State's claim, since that Act does not extend to the States any interest in the beds of navigable rivers beyond those afforded by the equal-footing doctrine. Pp. 324–325.

4. Title to the subject land, under the applicable federal common law, is vested in petitioner as riparian landowner and not in the State as owner of the riverbed. Pp. 325–332.

(a) Analysis of the interests of the State and petitioner, in

light of the rationales for the federal common-law doctrines of accretion and avulsion, compels the conclusion that, as between the State, as owner of the riverbed, and petitioner, as riparian owner, the surfacing of the subject land should be treated as an accretion; hence title to the disputed land should be vested in petitioner. Pp. 325–330.

(b) The doctrine of avulsion (whereby an avulsive change caused by a stream suddenly and perceptively abandoning its old channel does not affect title and the boundary established by the former river stream remains at that line, even if the result is to cut off a landowner's riparian rights) does not apply here because of the limited interests of the State in the subject property. Pp. 328–329.

107 Ariz. 465, 489 P. 2d 699, and 108 Ariz. 258, 495 P. 2d 1312, reversed and remanded.

MARSHALL, J., wrote the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a dissenting opinion, *post*, p. 332. REHNQUIST, J., took no part in the consideration or decision of the case.

Elmer C. Coker argued the cause for petitioners. With him on the briefs was *Leonard C. Langford.*

Dale R. Shumway argued the cause for respondents. With him on the brief was *Gary K. Nelson,* Attorney General of Arizona.*

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. JUSTICE BRENNAN.

The question for decision is whether title to land abandoned by the stream of the Colorado River as a

*Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Bork* for the United States, and by *Evelle J. Younger,* Attorney General, *Jay L. Slavelson,* Assistant Attorney General, and *Warren J. Abbott* and *Jerold A. Krieger,* Deputy Attorneys General, for the State of California.

Briefs of *amici curiae* were filed by *Philip E. von Ammon* for the Santa Fe Pacific Railroad Co., and by *David H. Getches* for the Cocopah Tribe of Indians.

result of a federal rechanneling project vests in the State of Arizona, as owner of the beds under navigable streams within its borders, or in petitioner cattle company, as the owner of land riparian to the river at the time of the rechanneling.

The circumstances that give rise to this case are as follows. In 1910, the subject land was conveyed by federal patent, as part of a larger parcel, to the Santa Fe Pacific Railroad Co. A survey conducted in 1905 and 1906, and approved by the Surveyor General of the United States in 1906, indicates that as of the date of the patent, the Santa Fe parcel abutted the east bank of the Colorado River.[1] Upon admission to the Union in 1912, Arizona succeeded the Federal Government to title to the bed of the Colorado River. The exact location of the river in 1912 in relation to the subject property is unclear from the record, but it is generally agreed that between 1903 and 1959 (when it was rechanneled) the river moved gradually eastward, eroding its east bank and depositing alluvion on its west bank, resulting in the submergence by erosion of the subject land. As the river crept eastward, the boundary between

[1] The federal patent to the Santa Fe Pacific Railroad conveyed a parcel of land in township 19 North of Range 22 West, described as follows:

"The lots one, two, three, four, five and six, the south half of the northeast quarter, the south half of the northwest quarter, the northeast quarter of the southwest quarter, and the southeast quarter of section three, containing five hundred eighty-nine and forty hundredths acres."

The map of the area, approved by the Surveyor General, indicates that, as of 1906, lots 5 and 6 of the Santa Fe parcel abutted the Colorado River. Petitioner Bonelli Cattle Co. was deeded a parcel of land constituting roughly the eastern half of the original Santa Fe grant. The Bonelli deed described the subject property as the "E[ast] ½ [of] Section 3, excepting Lot 2 thereof."

upland owners and the state-owned riverbed moved mechanically with it, transferring title to the lands which became part of the riverbed to the State. The operation of the Hoover Dam, begun in 1938, reduced the flow of water in the Colorado River and substantially decreased its annual flood stage high-water mark. Nonetheless, by 1955, when the Bonelli Cattle Co. acquired title to the subject portion of the original Santa Fe grant, all but 60 acres in the southeast corner of its parcel was covered by water. In 1959, a federal Bureau of Reclamation Project deepened and rechanneled the Colorado River in the area of the subject land, thereby confining the stream of the river to a substantially reduced portion of the Bonelli property.[2]

In 1962, the Bonelli Cattle Co. filed the instant action to quiet title to the land from which the river had withdrawn as a result of the federal rechanneling project. The state trial court granted judgment for Bonelli and against the State of Arizona. The Arizona Court of Appeals, the State's intermediate appellate court, affirmed, upholding Bonelli's contention that if the changes in the river were accretive, the surfaced land belonged to Bonelli, as a riparian owner, and if the change were avulsive, the land nonetheless belonged to Bonelli under the doctrine of re-emergence.[3]

The Arizona Supreme Court reversed,[4] holding that under the equal-footing doctrine and the Submerged Lands Act, Arizona holds title to the beds of all navigable

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[2] The rechannelization also surfaced a small usable pocket of land on the west bank of the Colorado River which was part of the Bonelli parcel. This land is not in Arizona by virtue of the Boundary Compact between Arizona and Nevada, approved by Congress, Pub. L. 87–50, 75 Stat. 93, and hence is not involved in the present controversy.

[3] 11 Ariz. App. 412, 464 P. 2d 999 (1970).

[4] 107 Ariz. 465, 489 P. 2d 699 (1971).

waters within its borders and thus to the subject land as a result of the gradual eastward movement of the river. The Arizona Supreme Court found that, because the federal rechannelization project was an "engineering relocation of the waters of the river by artificial means," it was, under state law, an avulsive change, which did not divest the State of its title to the exposed land which had formerly been part of the riverbed. The court denied a rehearing and, in a supplemental opinion, clarified the extent of the dry land owned by the State.[5] It held that the high-water mark of the river, to which the State's ownership extends, was fixed by the natural state of the river as it existed in 1938, before the operation of Hoover Dam.[6] We granted certiorari, 410 U. S. 908 (1973). We hold that the ownership of the subject land is governed by federal law, and that the land surfaced by the narrowing of the river channel belongs, not to the State as owner of the riverbed, but to Bonelli as riparian owner. We need not, therefore, reach the question of whether the Arizona Supreme Court properly determined the average high-water mark of the river.

I

The first issue we must decide is whether state or federal law governs this controversy. The State of Arizona claims title to the subject land by virtue of the equal-footing doctrine[7] and the Submerged Lands Act,[8] the basic principles of which are as follows. When the

[5] 108 Ariz. 258, 495 P. 2d 1312 (1972).

[6] Before the operation of Hoover Dam, the river's annual spring floods covered substantially more of the adjacent land than at any time thereafter. It is to the high-water mark of the river at this annual flood stage that the State of Arizona claims title.

[7] See Joint Res. No. 8, To Admit the Territories of New Mexico and Arizona as States into the Union on an equal footing with the original States, 37 Stat. 39.

[8] 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*

Original Colonies ratified the Constitution, they succeeded to the Crown's title and interest in the beds of navigable waters within their respective borders. As new States were forged out of the federal territories after the formation of the Union, they were "admitted [with] the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." *Mumford* v. *Wardwell*, 6 Wall. 423, 436 (1867). Accordingly, title to lands beneath navigable waters passed from the Federal Government to the new States, upon their admission to the Union, under the equal-footing doctrine. See, *e. g.*, *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845); *Shively* v. *Bowlby*, 152 U. S. 1 (1894); *Weber* v. *Board of Harbor Comm'rs*, 18 Wall. 57, 65–66 (1873).

In order for the States to guarantee full public enjoyment of their navigable watercourses,[9] it has been held that their title to the bed of a navigable river mechanically follows the river's gradual changes in course. See *Oklahoma* v. *Texas*, 268 U. S. 252 (1925). Thus, where portions of a riparian owner's land are encroached upon by a navigable stream, under federal law, the State succeeds to title in the bed of the river to its new high-water mark.

The Submerged Lands Act of 1953 did not disturb these doctrines or their inherent limitations. The Act merely confirmed the States' pre-existing rights in the beds of the navigable waterways within their boundaries by, in effect, quitclaiming all federal claims thereto. And, consonant with the above-described common-law doctrine concerning title to the bed of a river that has shifted course, the Submerged Lands Act quitclaims all federal rights to title to lands beneath the navigable streams, as "hereafter modified by accretion, erosion, and reliction." 43 U. S. C. § 1301 (a)(1).

[9] See discussion, *infra*, at 321–324.

The State of Arizona asserts title to the subject land on the basis of the following application of these principles. When Arizona achieved statehood in 1912, it assumed title to the land beneath the stream of the Colorado River, by virtue of the equal-footing doctrine.[10] It subsequently acquired title to the subject land when it was submerged by the river's eastward movement. The State asserts that once having acquired title, it was not divested of its proprietary interest in the land by the subsequent withdrawal of the water due to the rechanneling of the river.

Having concluded that title to the subject land was thus vested in the State as a matter of settled federal law, the state courts determined that local law controlled whether petitioner, as a riparian owner, had any interest in the land thereafter. As the Court said in *Arkansas* v. *Tennessee*, 246 U. S. 158, 176 (1918), "[I]t is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . ."

We continue to adhere to the principle that it is left to the States to determine the rights of riparian owners in the beds of navigable streams which, under federal law, belong to the State. But this doctrine does not require that state law govern the instant controversy. The issue before us is not what rights the State has accorded private owners in lands which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act—whether the State retains title

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[10] The Colorado River has been determined to be a navigable waterway, *Arizona* v. *California*, 283 U. S. 423 (1931), and, once found to be navigable, it remains so. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 408 (1940).

to the lands formerly beneath the stream of the Colorado River or whether that title is defeasible by the withdrawal of those waters. As this Court observed in *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22 (1935): "The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, . . . is necessarily a federal question. . . . [I]t involves the ascertainment of the essential basis of a right asserted under federal law."

Arkansas v. *Tennessee*, *supra*, and the cases cited therein are not to the contrary. In *Arkansas* v. *Tennessee*, for example, we held that federal law governed the question of how far into the river channel a State held title. Only then did this Court turn to state law to determine whether riparian owners had been accorded any rights in that land. But even the State's disposition of its submerged land *vis-à-vis* private owners was to be "in each case limited by the interstate boundary," a matter determined by federal law. 246 U. S., at 176. Similarly, in *Shively* v. *Bowlby*, 152 U. S. 1 (1894), the Court held that under settled federal law, the tidelands there at issue belonged to the State in its sovereign capacity; hence whether the State had accorded riparian owners any interests in the tidelands properly remained a matter of local law; "if [the States] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." *Id.*, at 43. In *Barney* v. *Keokuk*, 94 U. S. 324, 338 (1877), the Court left it to the States to decide whether to accord title to the land beneath nontidal navigable waters to riparian owners after recognizing that under federal law such lands belong to the States. See also *Scott* v. *Lattig*, 227 U. S. 229, 242 (1913).

The present case, however, does not involve a question of the disposition of lands, the title to which is vested in the State as a matter of settled federal law. The very question to be decided is the nature and extent of

the title to the bed of a navigable stream held by the State under the equal-footing doctrine and the Submerged Lands Act. In this case, the question of title as between the State and a private landowner necessarily depends on a construction of a "right asserted under federal law." [11]

II

We cannot accept the State's argument that the equal-footing doctrine supports its claim to the disputed land. Historically, title to the beds beneath navigable waters is held by the sovereign, *Barney* v. *Keokuk*, *supra*, at 338, as a public trust for the protection of navigation and related purposes.

> "[T]itle to the . . . lands under water . . . enures to the State within which they are situated . . . . Such title . . . [is] held in trust for the public purposes of

[11] Petitioner Bonelli and the Solicitor General of the United States, as *amicus curiae*, assert that this case should be governed by federal law for a different reason. In *Hughes* v. *Washington*, 389 U. S. 290 (1967), this Court held that where an upland property owner traced its title to a pre-statehood federal patent, the owner's right to accretions is a question of federal law. *Id.*, at 292. We are here again concerned with the right to accretions conveyed by a pre-statehood federal patent, but it is unclear whether, at the time of Santa Fe Pacific's patent, the portion of the land which ultimately became Bonelli's parcel, was actually riparian. Bonelli argues that its remote grantor, the Santa Fe Pacific Railroad, was given a patent by the United States which afforded it the right to riparian accretions as governed by federal law, and that it was expected that the river might wander within the parcel of land making parts thereof riparian which were not so at the time of the patent. Petitioner argues that its predecessor was therefore entitled to pass onto his successors all the rights he had in the property—including his riparian rights. We need not, however, decide whether *Hughes* compels the application of federal law to the controversy before us, because the State's claim in this case is premised on a construction of the federal equal-footing doctrine and the congressionally enacted Submerged Lands Act.

navigation and fishery." *Hardin* v. *Jordan*, 140 U. S. 371, 381 (1891).

See *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 808 (1950). As this Court observed in an earlier federal water law case:

> "Such waters . . . are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing . . . ." *Shively* v. *Bowlby*, *supra*, at 11.

The State's title is to the "[river]bed as a bed," [12] and the State of Arizona will continue to hold title to the bed beneath the Colorado River to its present high-water mark. But the exposed land involved here is no longer, as described in *Shively* "incapable of ordinary and private occupation . . . [whose] primary uses are public in their nature, for highways of navigation . . . ." [13] The equal-footing doctrine was never intended to provide a State with a windfall of thousands of acres of dry land exposed when the main thread of a navigable stream is changed.[14] It would be at odds with the fundamental

[12] *State* v. *Gill*, 259 Ala. 177, 183, 66 So. 2d 141, 145 (1953). For a perceptive discussion of the historical antecedents for the sovereign's rights in the beds of navigable waterways and of the State's modern interests in those lands, see Lundquist, Artificial Additions to Riparian Land: Extending the Doctrine of Accretion, 14 Ariz. L. Rev. 315 (1972).

[13] 152 U. S., at 11.

[14] The Supreme Court of Arizona relied on this Court's decisions in *Goodtitle* v. *Kibbe*, 9 How. 471 (1850), and *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), for the proposition that a federal rechanneling project could not diminish the extent of the State's landholdings. Those decisions involved post-statehood federal patents of land covered by navigable waters at the time of statehood. This Court held only that since title to lands beneath navigable waters was vested in

purpose of the original grant to the States to afford a State title to land from which a navigable stream had receded unless the land was exposed as part of a navigational or related public project of which it was a necessary and integral part or unless, of course, the artificial accretion was somehow caused by the upland owner himself. There has been no showing that the rechannelization project was undertaken to give the State title to the subject lands for the protection of navigation or related public goals.[15] Indeed, the State of Arizona did not participate in the rechannelization of the Colorado River, although it had implicitly assented to the project.[16]

The advance of the Colorado's waters divested the title of the upland owners in favor of the State in order to guarantee full public enjoyment of the watercourse. But, when the water receded from the land, there was no longer a public benefit to be protected; consequently,

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Alabama at statehood, the Federal Government did not thereafter own the subject lands, hence its attempted conveyance was void. The Court did not intimate that the operation of federal law could not diminish the State's title to lands formerly beneath navigable waters.

[15] For a discussion of the navigational-purpose limitation on the State's interest in the lands beneath its waterways, see *United States* v. *River Rouge Co.*, 269 U. S. 411, 419 (1926); *Colberg, Inc.* v. *State*, 67 Cal. 2d 408, 416, 432 P. 2d 3, 8–9 (1967), cert. denied, 390 U. S. 949 (1968); *Michaelson* v. *Silver Beach Assn.*, 342 Mass. 251, 173 N. E. 2d 273 (1961). The extent of the State's interests should not be narrowly construed because it is denominated a navigational purpose. See *Zabel* v. *Tabb*, 430 F. 2d 199 (CA5 1970), cert. denied, 401 U. S. 910 (1971) (recognizing conservation as a proper interest). Since the State asserts no public need for ownership of the subject land we do not attempt to define the exact parameters of the permissible public purposes.

[16] In contrast, this Court's decision in *Marine R. & Coal Co.* v. *United States*, 257 U. S. 47 (1921), involved a determination of federal rights in land created when the Federal Government itself filled in tidelands belonging to it under a series of interstate compacts.

the State, as sovereign, has no need for title. That the cause of the recession was artificial, or that the rate was perceptible, should be of no effect.

Nor does the Submerged Lands Act provide a basis for the State's claim to the subject lands. The Arizona Supreme Court incorrectly construed this Act as a grant by Congress to the States of lands "*formerly* . . . beneath navigable waters." [17] The Act did not abrogate the federal law of accretion, but defined lands beneath navigable waters as being those covered by streams as "hereafter modified by accretion, erosion, and reliction." [18] Contrary to the implication raised by the Arizona Supreme Court, the Act creates no new rights for the States in the beds of their inland waterways. The Act is not a grant of title to land but only a quitclaim of federal proprietary rights in the beds of navigable waterways.[19] The Act specifically excepts from its scope lands lawfully conveyed or patented by the United States.[20] Since the Act does not extend to the States any interest beyond those afforded by the equal-

[17] 108 Ariz. 258, 259, 495 P. 2d 1312, 1313 (1972) (emphasis added).

[18] 43 U. S. C. § 1301 (a) (1).

[19] The legislative history of the Act indicates that it was intended to be merely confirmatory of the State's existing rights in the beds of their navigable waterways. S. Rep. No. 133, 83d Cong., 1st Sess., pt. 1, pp. 6–8 (1953), *People* v. *Hecker*, 179 Cal. App. 2d 823, 4 Cal. Rptr. 334 (1960). See generally 1953 U. S. Code Cong. & Ad. News 1395–1640. Congress was concerned about this Court's decision in *United States* v. *California*, 332 U. S. 19 (1947), which held that the Federal Government had a "paramount interest" in the marginal sea-lands "outside of inland waters, but within territorial limits"—and that the States had no title in those lands. See H. R. Rep. No. 1778, 80th Cong., 2d Sess., 5 (1948). That concern is irrelevant to the case before us, which involves an inland waterway.

[20] 43 U. S. C. § 1301 (f).

footing doctrine, the State can no more base its claim to lands unnecessary to a navigational purpose on the Submerged Lands Act than on that doctrine.

III

The question remains as to who owns the subject land under the applicable federal common law. It is, of course, clear that the State of Arizona did hold title to the subject property before the waters of the river receded. Both the State and the Solicitor General of the United States as *amicus curiae,* urge that the federal common-law doctrine of avulsion is applicable and thus that the State remains holder of title in the former riverbed. Bonelli, the only private claimant, argues that the narrowing of the river course should properly be characterized as an artificial accretion, hence that the disputed land, which had originally been lost from the Bonelli parcel to the river by erosion, should once again belong to it as the riparian owner.

Federal law recognizes the doctrine of accretion whereby the "grantee of land bounded by a body of navigable water acquires a right to any . . . gradual accretion formed along the shore." *Hughes* v. *Washington,* 389 U. S. 290, 293 (1967); accord, *Jones* v. *Johnston,* 18 How. 150, 156 (1856). When there is a gradual and imperceptible accumulation of land on a navigable riverbank, by way of alluvion or reliction, the riparian owner is the beneficiary of title to the surfaced land:

> "It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased he is not accountable for the gain, and if it is

diminished he has no recourse for the loss." *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 624 (1912).

There are a number of interrelated reasons for the application of the doctrine of accretion. First, where lands are bounded by water, it may well be regarded as the expectancy of the riparian owners that they should continue to be so bounded.[21] Second, the quality of being riparian, especially to navigable water, may be the land's "most valuable feature" and is part and parcel of the ownership of the land itself. *Hughes* v. *Washington, supra*, at 293; *Yates* v. *Milwaukee*, 10 Wall. 497, 504 (1871). Riparianness also encompasses the vested right to future alluvion, which is an "essential attribute of the original property." *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68 (1874). By requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, riparianness is maintained. Finally, there is a compensation theory at work. Riparian land is at the mercy of the wanderings of the river. Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control. *Ibid.* The effect of the doctrine of accretion is to give the riparian owner a " ' "fee, determinable upon the occupancy of his soil by the river," and [to afford] the State [a title] to the river bed [which is] likewise a . . . "qualified" fee, "determinable in favor of the riparians upon the abandonment of the bed by the river." ' " [22]

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[21] *E. g., Nebraska* v. *Iowa*, 143 U. S. 359, 365–366 (1892); *Hardin* v. *Jordan*, 140 U. S. 371 (1891); *Anderson-Tully Co.* v. *Tingle*, 166 F. 2d 224, 227–228 (CA5), cert. denied, 335 U. S. 816 (1948).

[22] 107 Ariz., at 472, 489 P. 2d, at 706 (Lockwood, J., dissenting), quoting, *State* v. *R. E. Janes Gravel Co.*, 175 S. W. 2d 739, 741 (Tex.

The doctrine of accretion applies to changes in the river course due to artificial as well as natural causes. *County of St. Clair* v. *Lovingston, supra,* at 64–69; *United States* v. *Claridge,* 416 F. 2d 933 (CA9 1969), cert. denied, 397 U. S. 961 (1970) (changes in the Colorado River's course, caused by the construction of Hoover Dam, are accretive). Where accretions to riparian land are caused by conditions created by strangers to the land, the upland owner remains the beneficiary thereof.[23]

But the federal law is otherwise where "a stream suddenly and perceptibly abandons its old channel." *Philadelphia Co.* v. *Stimson,* 223 U. S., at 624–625. Such an avulsive change does not affect title and the boundary established by the former river stream remains at that line, even if the result is to cut off a landowner's riparian rights. *St. Louis* v. *Rutz,* 138 U. S. 226, 245 (1891). The rationale for the doctrine of avulsion is a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners were the accretion principle to be applied. As this Court, quoting from 8 Op. Atty. Gen. 175, observed in *Nebraska* v. *Iowa,* 143 U. S. 359, 362 (1892):

> "'[When in] deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed.'"

Civ. App. 1943), rev'd on other grounds *sub nom. Maufrais* v. *State,* 142 Tex. 559, 180 S. W. 2d 144 (1944).

[23] See sources collected at *Burns* v. *Forbes,* 412 F. 2d 995, 997 n. 2 (CA3 1969); cf. *Beaver* v. *United States,* 350 F. 2d 4, 11 (CA9 1965), cert. denied, 383 U. S. 937 (1966); *Esso Standard Oil Co.* v. *Jones,* 233 La. 915, 98 So. 2d 236, aff'd on rehearing, 233 La. 940, 98 So. 2d 244 (1957).

The Arizona Supreme Court held that because the rechanneling of the Colorado River was an "engineering relocation of the waters of the river by artificial means," it was, under state law, an avulsion and did not divest the State of title to the land from which the river had withdrawn. But federal law must be applied with a view toward the limited nature of the sovereign's rights in the riverbed, and an analysis of the interests of the State and Bonelli, in light of the rationales for the federal common-law doctrines of accretion and avulsion, compels the conclusion that, as between the State, as owner of the riverbed, and Bonelli, as a riparian owner, the surfacing of the subject land should be treated as accretion; hence title to the disputed land should be vested in Bonelli.

The rationale for the application of the doctrine of avulsion is not applicable to this dispute because of the limited interests of the State in the subject property. The Federal Government, which holds a paramount navigable servitude in the river,[24] determined that it was too wide and shallow to permit navigation in the area of the subject land, and that the river therefore needed to be deepened and rechanneled. The resulting changes in the river's thread actually enhanced the State's interest in the navigability of the river. The State's acquisition of the exposed land here could only be a windfall, since unnecessary to the State's purpose in holding title to the beds of the navigable streams within its borders.[25] Accordingly, the narrowing of the river and vesting of title to the surfaced land in riparian owners does not detract from the State's legitimate interest in title to

[24] See, *e. g.*, *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 633–635 (1912).

[25] See discussion, *supra*, at 321–324.

the riverbed,[26] so as to require mitigation of the accretion principle by application of the doctrine of avulsion.

The policies behind the doctrine of accretion are, however, fully applicable. That doctrine guarantees the riparian character of land by automatically granting to a riparian owner title to lands which form between his holdings and the river and thus threaten to destroy that valuable feature of his property. The riparian owner is at the mercy, not only of the natural forces which create such intervening lands, but also, because of the navigational servitude, of governmental forces which may similarly affect the riparian quality of his estate. Accordingly, where land cast up in the Federal Government's exercise of the servitude is not related to furthering the navigational or related public interests, the accretion doctrine should provide a disposition of the land as between the riparian owner and the State. See *Michaelson* v. *Silver Beach Assn.*, 342 Mass. 251, 173 N. E. 2d 273 (1961).

Similarly, riparian lands may suffer noncompensable losses or be deprived of their riparian character altogether by the State or Federal Government in the exercise of the navigational servitude. In compensation for such losses, land surfaced in the course of such governmental activity should inure to the riparian owner where not necessary to the navigational project or its purpose. In

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[26] The State may well have an interest in the river as an interstate boundary justifying application of avulsion principles to determining the location of that boundary; "[t]he emergence of . . . land . . . ought not in reason to have any controlling effect upon the location of the boundary line . . . ." *Arkansas* v. *Tennessee*, 246 U. S. 158, 175 (1918). But, since the land claimed by the State and petitioner is already limited by the interstate boundary, however determined, there is no such interest to compel application of avulsion principles to the disposition of title to the subject property.

the case before us, all of the subject land, which composed a substantial portion of Bonelli's parcel, was lost to the State by erosion to serve the public interest in the navigability of the river. Now that the land has resurfaced in the process of rechannelization, it should return to the estate of the riparian owner.[27]

"No other rule can be applied on just principles. Every proprietor whose land is thus bounded [by a navigable stream], is subject to loss, by the same means which may add to his territory: and as he is without remedy for his loss, in this way, he cannot

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[27] Under the doctrine of re-emergence, when identifiable riparian land, once lost by erosion, subsequently re-emerges as a result of perceptible change in the river course, title to the surfaced land revests in its former owner. See *Arkansas* v. *Tennessee*, 246 U. S., at 174–175; *Beaver* v. *United States*, 350 F. 2d, at 11. The re-emergence doctrine has been accepted by a number of States, *Herron* v. *Choctaw & Chickasaw Nations*, 228 F. 2d 830 (CA10 1956) (applying Oklahoma law); *State* v. *Gill*, 259 Ala. 177, 66 So. 2d 141 (1953); *Esso Standard Oil Co.* v. *Jones*, 233 La. 915, 98 So. 2d 236, aff'd on rehearing, 233 La. 940, 98 So. 2d 244 (1957); *Mulry* v. *Norton*, 100 N. Y. 424, 3 N. E. 581 (1885). Because of the limited interest of the State in the former riverbed, we have held the doctrine of avulsion inapplicable to this suit between the State and a private riparian owner, who is seeking title to surfaced land identifiable as part of his original parcel. In that sense, we have embraced the re-emergence concept.

But we need not here determine whether, in a suit between private landowners (or in which the State claims title in some capacity other than as owner of the riverbed), the differing interests of the parties might require a holding that the rechannelization should be treated as an avulsion. Nor need we determine whether, in a suit between a riparian owner and a former owner of surfaced land, the former should take the property as an accretion or the latter as a re-emergence. It is only the State's claim to title under the equal-footing doctrine which required the invocation of federal law to resolve the instant dispute.

be held accountable for his gain." *New Orleans* v. *United States*, 10 Pet. 662, 717 (1836).

Finally, recognition of the State's claim to the subject land would raise a serious constitutional issue as to whether the State's assertion of title is a taking without compensation, a question which we find unnecessary to decide on our view of the case. As MR. JUSTICE STEWART warned in *Hughes* v. *Washington*, 389 U. S., at 298 (concurring opinion):

> "Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. . . . [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate . . . ."

In the exercise of its navigational servitude, the State or Federal Government may decrease the value of riparian property without compensation because the property is held subject to the exercise of that servitude. The government may, without paying compensation, deprive a riparian owner of his common-law right to use flowing water, *St. Anthonys Falls Water Power Co.* v. *St. Paul Water Comm'rs*, 168 U. S. 349 (1897), or to build a wharf over the water, *Shively* v. *Bowlby*, 152 U. S. 1 (1894). We have held that the State may deprive the owner of the riparian character of his property in the exercise of its navigational servitude. *United States* v. *Rands*, 389 U. S. 121 (1967). But there is no claim here by the State that depriving Bonelli of the subject land is necessary to any navigational or related purpose. Cf. *United States* v. *River Rouge Co.*, 269 U. S. 411,

419 (1926); *Colberg, Inc.* v. *State*, 67 Cal. 2d 408, 432 P. 2d 3 (1967), cert. denied, 390 U. S. 949 (1968). Moreover, what is involved in this case is not just the diminution or elimination of riparian rights, but the State's attempt to completely divest all of Bonelli's title and interest in the subject land. See *Yates* v. *Milwaukee*, 10 Wall., at 504.

IV

We hold that title to the subject land, which was exposed by the federal rechannelization of the Colorado River, is vested in petitioner Bonelli Cattle Co. The judgment of the Supreme Court of Arizona is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, dissenting.

The Court in this case holds that federal common law governs the resolution of conflicting claims to the exposed bed of a navigable river between Arizona as the owner of the riverbed and a riparian landowner.[1] I

[1] The Court emphasizes the fact that it is the State that holds the title to the riverbed property. The nature of the title held by the State, however, is such that it could be conveyed to a private owner. ("[T]he settled law of this country [is] that the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable [rivers], within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof . . . ." *Shively* v. *Bowlby*, 152 U. S. 1, 47 (1894); *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 435 (1892); *United States* v. *Holt Bank*, 270 U. S. 49, 54–55 (1926).) Since the State could hardly convey more title than it held, it would appear from the Court's opinion

think this ruling emasculates the equal-footing doctrine, under which this Court has long held "that the new States since admitted have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." *Mumford* v. *Wardwell*, 6 Wall. 423, 436 (1867).

After the Revolution, the 13 Original States succeeded both to the Crown's title to the beds underlying navigable rivers and to its sovereignty over that property. *Id.*, at 436. "[T]he shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States." *Ibid.* If the equal-footing doctrine means what it says, then the States that were later admitted to the Union must hold the same title and must exercise the same sovereignty. *Weber* v. *Board of Harbor Comm'rs*, 18 Wall. 57, 65–66 (1873); *Shively* v. *Bowlby*, 152 U. S. 1, 16 (1894); *Pollard's Lessee* v. *Hagan*, 3 How. 212, 223 (1845). Just as with other real property within a State's boundaries, an element of sovereignty over the property constituting the riverbed is the power of the State's courts to determine and apply state property rules in the resolution of conflicting claims to that property. Today, however, the Court holds that federal common law supersedes the common-law property rules applied by Arizona pursuant to its sovereign authority over the property in question.

This Court has repeatedly recognized a State's power, as a function of its sovereignty over the lands within its borders, to apply state common-law property rules

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that federal law would also govern the resolution of conflicting claims to the exposed riverbed as between a private owner of the bed and a private riparian owner.

such as those applied by the Supreme Court of Arizona in this case:

> "Th[e] right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes . . . ; and also . . . to navigable rivers . . . ; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised." *Hardin* v. *Jordan*, 140 U. S. 371, 382 (1891).

With respect to an avulsion exposing large portions of riverbed and leading to conflicting claims to the ownership of the exposed land, virtually the twin of this case, the Court has said:

> "How the land that emerges . . . shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . Thus, [the State] may limit riparian ownership by the ordinary high-water mark . . . [or] may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion . . . ." *Arkansas* v. *Tennessee*, 246 U. S. 158, 175–176 (1918).

Along the same vein, the Court has said:

> "It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself. . . . The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country . . . . [I]t laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied . . . is for the several States themselves to determine. . . . [The decision] properly belongs to the States by their inherent sovereignty . . . ." *Barney* v. *Keokuk*, 94 U. S. 324, 337–338 (1877).

To put the matter bluntly, the Court's application of the equal-footing doctrine in this case seems to me wholly wrong. While conceding that the later-admitted States have " 'the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders,' " *ante*, at 318, the Court holds that "the nature and extent of the title to the bed of a navigable stream held by the State under the equal-footing doctrine" involves a " 'right asserted under federal law' " that must be determined under the rules of federal common law. The effect of the Court's analysis is completely to undercut the equal-footing doctrine. As noted above, the original States derived their sovereign rights

and powers directly from the Crown after the Revolution and retained whatever powers they did not later surrender or limit in the Federal Constitution. Even under the Court's "title" analysis, therefore, federal common law would not govern the conflicting claims involved here if the river were located in Massachusetts or Virginia, rather than in Arizona.

The upshot of the Court's decision is that the 13 Original States are free to develop and apply their own rules of property law for the resolution of conflicting claims to an exposed bed of a river, while those States admitted after the Constitution's ratification must under today's decision knuckle under to this Court's supervisory view of "federal common law." A later-admitted State like Arizona is thus not at all on an equal footing with the original States in the exercise of sovereignty over real property within its boundaries. And the vehicle used by the Court to arrive at this unjust result is, incredibly, the very doctrine that was intended to insure to the new States equal footing with the original States. Thus, the Court's strange application of the equal-footing doctrine brings that constitutional principle into fundamental conflict with the purpose it was intended to serve.

If the equal-footing doctrine means anything, it means that Arizona cannot be treated as a second-class State. It means that, upon admission to the Union, it received title to, and sovereignty over, the beds of navigable rivers within its boundaries, to the same extent as the original States after the Revolution. As a function of that sovereignty, Arizona courts have the power to develop and apply state common law in determining legal questions that arise with respect to this property, including conflicting claims to the bed that is later exposed by the vagaries of the river. And

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wer of the Arizona courts to decide this contro-
the po under state law surely includes the power to
versy it in a way that we here might think is wholly
decide
wrong.

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court implies, but does not hold, that the decision of the
[2] The Supreme Court might constitute a taking of the petitioner
Arizona npany's property without compensation, in violation of due
cattle co law. My conviction that this infirmity was present in the
process of the Washington Supreme Court was the reason for my
decision ncurrence in *Hughes* v. *Washington*, 389 U. S. 290, 294–298
special c*Hughes* was a case in which a state court effected a retro-
(1967). ange in state property law that resulted in an unconstitu-
active cl ing of property without compensation. That, however, is
tional ta ituation here. The Arizona Supreme Court simply applied
not the s shed property rules with regard to the effects of avulsion,
its establ erosion, and reliction in resolving conflicting claims to the
accretion iverbed. It declined the petitioners' invitation to adopt the
exposed bed" re-emergence doctrine as part of the law of Arizona.
"enlighte , therefore, does not involve a retroactive alteration of
This cas such as would constitute an unconstitutional taking of
state law roperty.
private p